The stars ... from sight,
No trace of them we find;
... from the brow of night.
... one is left behind
Alone,
And none is left behind.

... he sun goes d...
... in all his ray...

"BY THE RIVERS OF BABYLON."

We sat us down and wept
Where Babel's waters slept,
And we thought of home and Zion as a long-gone, happy dream;
We hung our harps in air
On the willow boughs, which there,
... were drooping o'er the ...

... we wore
... at shore
... ness of woe.

... ery low."

... hand?

Elizabeth ...
Avery

[Written ...]

Halleck.

EVENING.

See, the summer sun is sinking
Down behind the hills,
And the evening ... blinking,
While the spa...
Mu mur ev... as they wander
To the far ... mills.

Day is past, the sky is studded
O'er with ... bright,
And the silvery ... advances
With its ... light;
All the birds ... ceased their singing,
For 'tis ... —still night.

All is still ... murmuring
Of the s...
Or the di...
Of t...
Now it ... longer,
And ...

To ...
My ...
And I, ...
With ...

... sew,
not know
... came
... sus' name.
... ol-house rear'd,
... oods cheer'd
sew-
... ht to know
... re,
... he white man evermore.

... made des...
... enbeck, the youn...
... ently widowed, ...
... grave, after a fe...
... the lamp ha...
... ious. It contained c...
... ry care was observed, a...
usual manner, instantly a...
the lamp shattered into fra...
daughter were enveloped ...
will probably recover; but
daughter was so deeply burned
and arms, that lockjaw ensued,
pain... ... ene on last Sabbath
do ... not ... pure spirit is now
... Sabbath in the presence of
loved and served.—Newark Adv.

Charlett
Elizabeth
Everett
1856

... mother
... gentle
... breast
... the
... we
... eter-
... she

... shrine

Yes ... the s...

... they met
... walk, their first young
While ... mer flowers with moonlight dews were
And ... nds sigh'd soft around the mountain's brow,
And all was rapture then which is ... memory

received by the Defendant (1 Bac Ab. 72. Willes 208.) It is given in other cases by Statute 4 & 5 Ann C. 16.) which enacts that actions of account shall & may be brought & maintained by one joint Tenant or Tenant in Common his or her executor or administrator vs the other as bailiff for receiving more than comes to his or her just share or proportion & vs the Executor or Administrator of such joint Tenant or Tenant in Com. " At Com Law an action of account did not survive to or vs an executor or administrator (Lit. 125 Co. Lit. 90b. F. N. B. 117 E. Com. Dig. Accompt D.) But now by Statute sess. 36. C. 7. 5. "Actions of account shall & may be brought & maintained by an against Executors & Administrators in all cases in which they might have been maintained by or against th[e] respective Testators or intestates." This action however become[s] obsolete the action indebitatus assumpsit or a bill of account in Chancery being considered easier & more beneficial remedies. Yet it may be questioned whether the action of account is not still a preferable remedy as the Statute 3. 1 R. L. 91. authorises the auditors to examine the parties under oath, which is the great benefit usually proposed in bringing a Bill of account in Equity; In Chancery there must always be a reference to state the accounts between the parties & ascertain the balance. See observations of the Chancellor in 3 Johnsons Ch. Rep. 361.

According to the authorities the action of account will not lie for a sum certain but only for the rents & profits of it 1 Bac 19. 1 Co. Lit 87.

G. says that this rule is not law & that nothing more is meant by it than that it will not lie vs one as Bailiff for a sum certain. [illegible] Hobt to be the opinion of the Judges that the action of account was the proper action to be brought vs Sheriff who had rec. a sum certain to the use of the plaintiff Hobt. 206. It is also laid down by Coke & others that one who received a sum of money to trade with to the use of another that an action of account will lie vs him as Receiver & here a sum certain was meant [illegible] 172 a. 2. Vio 101. Fit N. B. 116. 1 Com 87. 1 Roll 116.

In Conn the action of account will lie for a sum certain vs one as Receiver Kirby 163.

If money is delivered by A to B. for the use of C the action of account will lie in favor C vs B. but on the other hand if money be delivered A to B. to deliver to C. & B. dont deliver it A cant maintain action of account vs C. the reason is said to be because there is no privity of [illegible] But there is as little privity in the first as in the last & the rules [illegible] be contradictory Co Litt 72 Fit N. B. 1[illegible] [illegible]

If a Bailee of Goods refuse to deliver them to the Bailor action of account will not lie in favor of the Bailor to compel the Bailee to account for their keeping the goods is a tort & there is no privity between them for he does not keep them for the benefit of the Bailor but tortiously &c (except the case of Infants & the King) 1 Roll Abr 115. 1 Bac 10 neither will the action of account lie to compel a Receiver to account for the rents & profits of the estate 3 Leon 24. 1 Com 89 neither is a finder of goods liable in action of account for there is no privity of contract &c

Neither is a Bailiff of a Receiver or Deputy liable in an action of account for there is no privity between him & the Bailor Fit N.B 119. 1 Roll. 118. 1 Com 87.

Neither is an Infant liable in an action 1 Roll 117. Co Lit 172 a Fit N. B. 118

If one who receives the property of another makes an express promise to account for it he may be sued on the promise to account or in an action of account 1 Sal 9. Carth 89. Espinas 96.7.

It is said by Holt that if a Plaintiff bring his action on the assumsit to account he cant travil into the items of the account but shall confine his proof to the promise & recive only his special damages in consequence of such promise if this be true the Plaintiff will be entitled to both actions but this opinion of Holt was considered by the other Judges & by a Note of the Edr of Bac in Eng they go into the items of the account between the parties in an action brot on the promise to account 1 Bac 20

G. says that an implied promise to account is sufficient to support an action & that the law will in most cases raise one on the part of the Bailiff & Receiver to account & he says that the practice in Eng must be to sue on the implied promise in assumsit to account which has rendered the action of account almost useless & this appears by the note in 1 Bac 20 it is therefore very difficult to determine at this day from the English authorities what the law is respecting the action of account If one by deed acknowledges that he has rec'd property of another to account for the owner may bring his action of account or his action of the deed (of covenant or debt as the case may be) tho the remedy on the deed is of a higher nature yet it is not the same [illegible] not a contradiction to this rule that the higher remedy

be resorted to tho an action will bar the other yet they are not for the s[illegible] nor does this deed merge the parol promise to account but disclaim it tho writ will merge a par[illegible]contract when it disclaims it for then it may be i[illegible]fied & the reason why a parol contract merges in a written one is because cant be identified so as to appear to be the same 1 Rol 118. Dyr 20. Co E. 644

Of The Pleadings in an Action of account

The Declaration in an action of account must state that the defendant at such a time as Bailiff, (or Receiver as the case may be) recd. of the Pltfs Goods (as case may be) to render his reasonable account therefor & that the defendant refuses to render his reasonable account which is the gist of the action & the Plaintiff demand in stating his action is two fold 1st. that the defendant a render his account 2d. that the Plaintiff demands his damage & his costs i.e. for the balance due in his favor & for this the action is brot

Hence it follows if the Plaintiff finally prevail there are 2 Judgments the first that the defendant do render his reasonable account & on this Ju[dgment] being found for the Plaintiff the court appoint auditors & Commissioners thereunto receive the accounts of the parties & the proofs thereof & adju[st] them & find the balance due the Plaintiff & make up the contract & Report to the Court of the settlement of such account & the Balance d[ue] & on such Report the Court render final Ju[dgm]ent that the Plaintiff recover such sum in damages 1 Willi 99. 1 Com 92. 5 Mod 42. 1 Bac 21.

The action of account brot by one joint tenant. Tenant in Common or as their Co Tenant the declaration must charge the defendant as Bailiff But must state that the defendant was a Joint Tenant & (as the case may be) with Pl. & that as such he state the circumstances of the case so in case of a joint Merchant except he must be charged as Receiver & not as Bailiff see the authorities above

The Auditors after being appointed must notify the Parties to appe[ar] before them at such a time & exhibit their accounts & they then make re[port] (or as it is some times called a verdict) & on this report (if accepted by the Court) the Court give final Judgment as on a verdict of a Jury 5 Com 95.

In Con it is provided that the Court shall award auditors a reasonable [fee] for their trouble & the Court will Order the party who prevails to pay s[uch] sum before Judgment is rendered. But it will be allowed him in his Bill of costs Stat. Con 37.

The parties by Statute are allowed & also compelable to testify for & vs [them]selves before the auditors (tho by the English Law they are not allowed) & if [they] refuse after they have appeared & produced their accounts they may be imprisoned until they will But if the parties refuse to appe[ar]

Notice by the auditors or refuse to produce their accounts Judgment will go in favor of the other & for the Plff to recover his whole demand & for the defendant to recover his costs Cro E. 856. 3 Will 117. our Statute also provides that if the auditors find a balance due in favor of the defendant they shall award such sum in his favor in damages & the Court if they accept the report will give Judgment for such sum with costs but in Eq only costs is allowed the Defendant unless the accounts are brot in a Court of Chancery But Chancery will allow the defendant the balance due in his favor 1 Bac 16. In Com a similar provision is allowed the parties in an action of Book debt as an action of account.

Pleadings on part of the defendant in action of account

There is a difference of opinion in the Books as to what the defendant may & may not plead in bar to the action of account 3 Will 115.

Tis a general rule that the defendant is competent to plead anything which shows that he ought not to be compelled to account as that he was never Bailiff or Receiver to the Plaintiff as he has alledged in his declaration & of this put himself upon the country but its not sufficient for him to show that the Plaintiff ought not to recover of him in the end for the defendant may notwithstanding Judgment goes as him to account & go in favor of him finally 1 Roll. Ab: 121. 1 Com 91. 1 Bac 20.

It is competent for the defendant to plead in bar a release of all actions 4 Bac. 85. 1 Roll 123.

So an award of Arbitrators that the defendant should be discharged from all liability to account or an award that the Plaintiff should execute a release to him of all actions for an award (by arbitrators to whom however the parties have submitted their disputes) that the Plff shall release the defendant Amount to a release in Judgment of Law & he is not in such case competent to plead that he never executed the release Cro E. 82. 4 Bac 85.

The Books say that it is competent for the defendant to plead in bar that he received the money to deliver to a third person & that he has delivered it over 1 Com 91. 4. 1 Roll 122. 6 Co Elis 830. 3 Wills 115.

But it is also a rule that no plea in bar to an action that admits that the defendant has been once liable except a Judgment for the same cause as a release or something in the nature of a release which seems to contradict the former rule unless they provided in that case on the ground that the defendant had not been liable & the authority of this last rule cant be questioned 1 Roll 126. Cro Elis 830. 3 Wills 115

Assumpsit

Assumsit is an action which was not known at Com Law by but was introduced by Statute of Westminster 2d. It is commonly called an action on the Case or Action of Trespass on the case & before the making of this Statute no action would lie on a promise to do a certain act unless the promise was entered into by covenant or deed & the Statute gave a remedy in all cases of promise that were just & legal according to our particular case 2 S ift 21.

The general division of assumsit is Express & implied or special & indebitatus. An express or special assumsit will lie on an express promise to do a particular thing as to pay a sum of money or build a House & such special assumsit may appear in evidence either by parol or in writing provided it is legal or according to justice & sound policy

The special agreement or express assumsit is the rule of damages in an action on that assumsit or promise & as a general rule the Court before whom such action is brot is bound to give such sums as is agreed by the parties in making such agreement or promise.

An implied promise is not founded on any actual promise or engagement but on a promise raised in Judgment of Law

The action of Indebitatus or implied assumsit will lie in all cases will in all cases where one is under a moral obligation to pay another a sum of money which he in good conscience cant retain unless founded in some principle of policy 2 Burr 1005.

The action of debt would lie at Com Law to recover a sum certain the above rule completed a promise to do some collateral act debt may still be brought tho seldom practiced & Reeve thinks the wager of law would not in all cases be allowed

In an action of implied assumsit not the actual agreement but the indebitness is the rule of damages or ground of recovery there if one find a sum of money & is not at expense in finding the owner & afterwards refuse to deliver it to the owner yet he shall be allowed for his expense 2 Burr 2133 Strange 915

It is said down by some that the action of implied assumpsit is always founded on a supposed promise or promise in Judgment of Law as it sometimes is as where one takes up goods at a Store without receiving actual promise to pay for them, here implied assumsit will lie on a quantum valebant or a supposed promise to pay what they are worth.

but in many cases the action of implied afsumsit will lie when there can be neither actual or supposed promise but because this first right that a recovery should be had as where one tricks another out of a sum of money by some fraud as money found or money paid by mistake or if one takes away property with force & keeps it or sells it I may either bring my action of implied afsumsit to recover the value of the goods or the money for which they were sold by treating the wrong done as my agent 21 Jan 1805.

Expres & implied afsumsit are often concurrent but in most cases they are not.

If one expresly promise to pay another a sum certain as £20 action will lie on the expres agreement to pay that sum or implied afsumsit will lie which is raised in Law from the mere indebtedness & the expres agreement may be given in evidence to prove the indebtedness from which the Law will raise a promise

So too when a sum certain is given by expres agreement for some cases by implied agreement debt will lie Hence it is that in some cases debt Expres & implied afsumsit are all of them concurrent & debt will lie in all cases where indebitatus afsumsit will if there can be supposed any privity of contract between the parties as when the goods are taken up at a Store without any other contract than to deliver But when one finds a sum of money or cheats another out of it or it is paid to him by mistake Indebitatus afsumsit will lie but debt will not there being no privity & contract &c

But Indebitatus afsumsit will not lie on an expres agreement to do some collateral act as to build a House or the like but in such case expres afsumsit is the only remedy.

No more or less than is agreed between the parties as a general rule can be recovered in an action of expres afsumsit tho. the promisor be subject to great damages in consequence of the non performance

This rule has been broken in upon in one or two instances which destroys the Symetry of it (viz) when one promises to do or pay something if it appears that he did not have a proper time or knowledge of the consequence of the promise or in any way entraped by the superiority of the other party Courts will order the jury to find the real sums which injustice ought to recover & not the sums agreed between the parties as where a party sold his horse for forty cons for the first nail in the horse shoe & doubled at every nail &c in an action brot on this promise the Court directed the Jury to find only the value of the Horse in damages Reeve says this decision is an unwarranted departure

Also a plea that the defendant has delivered the money over to the Plaint before action but is no good plea for it is no answer by the defendant that the Plaintiff ought not to recover finally 1 Roll 123. 4. 1 Bac 20
so also a plea by the defendant that the Plaintiff has executed a receipt to him for the money is not a good plea but G. thinks this would as it is in the nature of a discharge 6 Co 7 Sym 22. 4 Bac. 85.
A plea that the defendant has fully accounted is a good plea for this shows that he is not liable to account but in this case the defendant cant travel into the items of the account to show that he has accounted but must confine himself to the proof of that he has rendered his reasonable account & that the Plaintiff accepted the account 1 Com 91. 3 Wills 113. (Contra)
It is also a rule in England that the Deft must plead any thing which shows he ought not to account specially in bar of the action 3 Wills 113. 4.
But by the general words of our Statute it may be given in evidence under the general issue which Statute provides that any thing except a release or what amounts thereto by the Plff may be given in evidence under the general issue
The Parties may also plead & join issue before the auditors but in such case the auditors cant proceed to take the accounts but must remit the issue back to the Court there to be tried & thus whether it be an issue in fact or in law 1 Com 93. 3 Wills 94 177. Cro E. 1. 84. 806. 1 Bac 21.
And the Court on the trial of such issues must render Judgt for him in whose favor the issue is found if for the Plaintiff judgment must be given for him to recover his whole demand if for Deft in any his costs might be sent to the auditors the Defendant might put in a frivilous plea 3. Wills 117.
It is a rule in pleading before Auditors that what can be plea in bar to the action cannot be plead before them Stiles 411. 1 Com 93. 3 Wills 73. 101. 113.
Nothing can be plead before the Auditors which will contradict the Judgment of the Court that ordered them to account 3 Wills 114.
Therefore a plea that the Deft was never Bailiff or Receiver is no good plea Cro C. 82. 3 Wills 113.
But it is competent for the Deft to plead any thing before

Auditors that shows he ought not to be eventually liable as that the property was destroyed by inevitable accident &c this is good accounting for this could not be plead in bar Co Lit 89 a. 1 Com 93. 1 Roll 124. 1 Bac 21

There is a plea where the goods were taken away by Robbers was a good plea in bar to the action but this admits that the Defendant has been once liable & therefore contradicts a former rule that appears well established & ought not to be considered as Law Stra 690.

A plea by the Deft that the goods were Perishable & that he was obliged to sell them on Cr. is no good plea before Auditors for he has no right unless he has a special Commission to sell & Cr. them 2 Mod 100. 1 Bac 21.

But it is a good plea for the Defendant that the goods did perish without any fault on his part 1 Com 91. Co Lit 89 a & is good accounting.

In Con an action of Account may be brought before a single Majistrate but after he has rendered judgment that the defendant do account he must receive the Amount himself & adjust them It is Provided by our Statute that an Action of Book debt for more than 17 Dollars the Court may proceed as in an action of debt But of this sum a single Majistrate has not cognizance Statute 27.

An appeal is allowed on a Judgment rendered by the Court on the award of arbitrators Statute 3

In Eng the Practice is to file a Bill in Chancery to compel the Deft to account & here the Parties are compelled to testify & are entitled to each others Books & papers & the defendant is entitled to recover the balance if any due in his favor 3 Bla 437. 381. 2. 449. 1 Bac 16.

If in making up the report of the auditors either party thinks himself injured he may petition to the Court to be releived in the award by a written remonstrance to it 1 Bac 21 if the party prevails in his objection to the award the Court will send the parties back to the arbitrators & in case when the Arbitrators have made a mistake in computing the sums the Court will suffer the party in whose favor the report is to enter a remitter as to the sums above the just one but as a gen rule our Court will not on a remonstrance by the injured party inquire into the facts on which the arbitrators founded their award but if there has been a mistake as to the point or law appearing on the face of the record or from the examination of the arbitrators they will set aside the award Kirb 35? Root 137. 261. 8.

In Con if the Auditors exceed their Com their award will be set aside so too if they make a mistake upon their own principles as tis called the award will be set aside which is when they make a mistake in their own method of computation & the like & to divers mistakes of the Auditors themselves may be excused Root 268. 413.

from principle & it would be better to consider it as no contract at all for the mind of the parties never met in making such a contract nor is ones Contract enforced by the Court but a new one is made or them.

There is also a necessary exception to this rule which is when the parties agree on a sum to be paid in the nature of a penalty for the purpose of enforcing some other act to be done as if one agree to go to Hartford & engages if he does not to pay 20£ courts of Law will treat such penalty as nugatory & consider the contract as if no such penalty had been annexed tho formerly it was otherwise holden

Express & ind lied assumpsit will in some cases lie to redress the same injury & one will bar the other & stile they are not concurrent as they are not brot for the same thing but have different objects in view as where one pays another money to do an act & the other fail to do the act Express assumpsit will lie to recover damages for non performance of the promise or Indebitatus assumpsit will lie to recover the sum so paid as tho no promise had been made but as tho he had not rec^d. the money to your use & tis not in his mouth to say that the money was paid on such a contract Stra. 456 or 406. 407.

In many cases the promisee would recover more in the one than the other But Expres and implied assumpsit are concurrent & you may recover the sum in an action that you will in the other & the rule of damages will be the same but they are concurrent in no case except there is an express promise to pay a sum of Money or other property.

If one make a promise to several jointly to do a certain act as to layout a Township of Land & each of them promised pay him a sum for doing the act & he fail to do it each may have his action on the implied promise for money had & received (Whereas if they sue on the express promise they must all join

so an advantage may arise in this case in another way for if one pay another money to deliver him property on such a day or to transfer stock on such a day & the promisor fail to do it & the value of the property to be delivered is low at the time of the delivery he may sue on the implied promise for the money so on the other hand if the value of the property is high at the time it was to be delivered he may sue on his express promise & recover the value of it at that time

It is immaterial in [illegible] whether the express agreement be in writ

or proof for the Indebitatus assumpsit is not on the ground that there is no express agreement that is of any effect this must be a Judgment for the Plaintiff by bringing his implied assumpsit is allowed to treat the express agreement as no agreement at all. But in Law it is practiced to compell the promisee if he has a written agreement to sue on it. That if the express agreement be by parol he may sue either on that or on the implied assumpsit this practice of compelling the promisee to sue on the written agreement was adopted under idea that both actions were brot for the same thing. It is true that when one has two good remedies for the same thing he must pursue the one of the highest nature.

Indebitatus assumpsit is sometimes concurrent with trespass or trover for if one unlawfully take away my property I may treat him as my agent as tho I delivered the property to him for my use & if he should sell such property for double its value I may bring my action of Indebitatus assumpsit for money had & rec'd. to my use & recover the whole sum which he gets for the property therefore in such case it would be advantageous to waive the tort. so to it may be concurrent with the action of fraud in many cases tho there is no advantage in any case in bringing the assumpsit But when one cheats or defrauds another out of a sum of money by a deceit the action of Indebitatus assumpsit will lie to recover the money gained or if one should sell a forged Order or Bill.

By a written Contract is meant one that contains a detail of the original Promise or contract & not as Note of hand or other ins. where the naked Contract does not appear such written Contract stands on the same footing as a parol one you may therefore declare on the parol agreement & give the writing in evidence hence the rule that such contract may be given in evidence to prove a sum certain is due in an action of implied assumpsit raised from such indebtedness in an action brot on such written contract you must prove it precisely in the manner it is laid in the declaration or you can not recover for otherwise it will not appear the same Contract & will not therefore bar another action for the same thing or on the same Contract:

If action be brot on such Contract its nakedness will appear therefore if such contract is illegal or any way defective so that no Judgment ought to be rendered on it the Declaration may be demurred to Whereas if such contract had

been secured by a Note Bill, Bond &c. it would not appear in evidence & tho the original promise is defective yet the declaration can not be demurred

In an action brot on a contract which is detailed at length you must show in your declaration every requisite which is required by law to make a good contract & the omissions to state such requisites will be fatal.

But to the above rule there is an exception in one class of cases which is where a contract which is good by parol at Com Law but required to be in writing by Statute Frauds & c requires such requisite need not be shown in the declaration.

If in such case the promise is not alledged to be in writing the defendant must take advantage of it on the trial by pleading the Statute or by showing that such promise is within the Statute for if he suffer the Plaintiff to prove a parol promise to support such declaration & Judgment is for the Plaintiff it will be no cause for omitting but must that the contract was not in writing for the declaration is good this your own folly to suffer the Plaintiff to prove such promise by

It is laid down that a prior moral obligation is a sufficient consideration to support a promise to fulfill a moral obligation. But such promise would be nugatory unless the promisee is in need of such promise to compel such obligor to fulfill such obligation therefore if one should promise to pay a Bond which he was obliged by Law to pay no action would lie on such promise. But this rule contemplates those cases only where there is a prior moral obligation which will not support an action owing to some principles of policy as debts barred by Statute of Limitations or void on account of its being usurious &c Co Litt 206 212. 598.

But when one for some new consideration promises to fulfil an obligation which is binding on him such new promise is binding as where one obligor promised to pay the obligee to pay a bond which he held on him in consideration that he would show it to him.

But in an action on such promise the obligee would not recover the sum due on the Bond in damages in consequence of his not paying the Bond according to his new promise

If one recover a sum of money of another by Judgment of Court which in good conscience he can not retain it may in many cases be recovered back as where money is recovered on a policy of Insurance of a Ship which afterwards returned & where an endorser of a Note &

with the endorsor never to call on him for them but took them at his own risque but the indorsee sued the Indorsor on his Indorsement in seperate actions in a Court where the defendant could not plead his covenant in bar he not having cognizance of a covenant of that amount the defendant recovered the sum back in a suit of Indebitatus assumpsit 2 Burr 1005

But in no case can the merits of a Judgment be over hawled to find out where it was usurious or not for a Judgment is always conclusive on the parties until it is reversed 2 Burr 1005.

But Reeve supposes that if by fraud one recovers a greater sum than he is entitled too that such sum more than the lawful one may be recovered back in an action of Indebitatus assumpsit as if the Plaintiff should agree with the defendant that if he would not appear he would take default for only the amount really due & he should take a Judgment for the whole sum laid in the declaration which was more than the just demand

Money recovered on a Judgment that is afterwards reversed may be recovered back in this action Bull. 172 Cowper 419.

It is laid down generally that where more than lawful interest is taken on a sum due that it may be recovered in this action 2 Burr 1005.

But this rule says Reeve ought not to hold unless there has been some oppression for if the rule is to hold gen it will be making a positive Statute a rule of conscience between the parties as the action Indebitatus assumpsit lies to recover money only where the deft cannot in good conscience confine or retain it

One may have a perfect right to recover a sum of money when in good conscience he ought not But Courts of Justice will never assist one by granting him a new trial to make such inequitable claims a defence therefore if one is tried on a demand that is barred by the Statute of Limitations if he neglect to take advantage of the Statute & make some other defence he will never be allowed a new trial to make this defence so if a Jury find a verdict as the Plaintiff in a pretty action of Slander tho he had a legal right to recive a small sum yet he would not be allowed a new trial.

As the action of Indebitatus assumpsit is an equitable action a defendant will always be allowed any equitable defence therefore if one should find money which he could in good conscience retain yet tho he refuse to deliver it

to the owner she shall be allowed all expence in keeping it & in trying to find it for the owner &c 4 Burr 2133. Stra 915.

It seems that if an Attorney receives more money than is due on a demand by mistake from a Dr. he will be liable after a demand made whilst the money remains in his hands but if the money is paid over to the principal he only is liable Stra 480.

[redacted] general rule that if a man pays money on a consideration which fails totally that the money may be recovered back & whether it was paid on a fair or unfair contract

But where two persons enter into a contract where there is a bonafide hazard no action will lie to recover money paid on such contract this the consideration totally fail as where one is doubtful about his title to land & another being acquainted with the circumstances agrees to give him half the value of the land for the title in this case paid he shall not be allowed to recover back the money so paid & it is held that the compromise of a doubtful right is a sufficient consideration 1 Ld R. 173. 2 Ld Raym 364.

If one receive money acting under a void authority tho. he supposed he was acting under a lawful one it may be recovered back in this action 1 Salk 17.

It is laid down that Indebitatus Assumpsit will not lie for money or goods that are States the reason is said to be this that all private rights are merged in the public But as this is the only reason the rule cant obtain in Com. as the doctrine of merger is not known here. Thus one who has stolen the goods of another can in good conscience retain them

In Eq the action has been allowed to be brot in cases very near allied to this which is where money has been embezzled & some cases have only differed in name from Larceny 1 Vern 90.

This action lies for goods sold & it also lies for work & services done as for an Attorney to answer his fees so for a Physician &c & so it also lies on an insimul Computarent in for the balance of book accounts on a settlement by the parties & in all these cases Indebitatus Assumpsit lies whether there was an express agreement or not & when there is express agreement the sum agreed is to be the rule of damages but when there is no express agreement & the act

For th

is brot for goods sold the action is brot for goods sold the action is said to be brot on a Quantum valebant ie to recover as much as the goods were worth & when this brot for services done this brot on a quantum meruit ie to recover as much as the Plaintiff deserves for his labor.

When one offers to sell his goods for a certain price & another offers to give it (tho this dont conclude the bargain) it is in the power of either to conclude the bargain (viz) the owning the goods & having the right to the money & the other by tendering him the money vests in him the right of the goods & may thus bring his actions to recover one the money & the other the value of the goods & the action of Assumpsit would lie. In both cases the Action over might be brot for the goods 4 Burr 2569

But if one should offer a sum for his goods to be paid at a future time & the owner of the goods offers to take it the bargain is incompleat & the vendee may demand the goods 4 Burr 2569.

But if this a part of the contract that the vendor shall at some future time deliver the goods he takes the risk upon himself & becomes Bailee of the goods & the bargain is compleat But if the vendee gives orders as to the delivery to take the risk upon himself Comp 295.

A voluntary courtesy will not support an action tho the act done be never so advantageous to another as an act of charity or gratitude &c 2 Stra 728

But if one do an act which it was the duty of another to do & was actually necessary to be done at request of the other tho the act is not necessary to support the action as to furnish one child &c with necessaries 2 Stra 728.

No action will lie on a contract without a consideration this is a immutable Law how trifling it is & it is necessary that some consideration always appear from the declaration.

So too no action will lie to recover money paid on an illegal consideration nor will an illegal consideration support a contract 2 Burr 924.

But this rule will hold only in cases where both are equally guilty in the illegal transactions for if one pay money on an illegal contract that he has been drawn

into by undue advantage of the other he may recover it back as money had on an usurious Bond so when one took an undue advantage of another he may recover it back as money had on an usurious Bond as also in case of a certificate Bankrupcy for his Brother who was in a distressed situation 2 Burr 924.

So if one pay another a sum of money to do an act which he is in duty bound to do it may be recovered back in this action 2 Burr 924.

So a consideration that is wholly past will not support an action on a promise made on such consideration unless there was an existing duty arising from such consideration

Therefore formerly according to the old rule if one should voluntarily do an act for me & afterwards in consideration of that act should promise to pay him I should not be bound by it but the old rule is a little varied & a past consideration now & was beneficial to the promisor will be sufficient & but a parol consideration which was not beneficial to the promisor will not support a promise sufficient to ground an action upon Cro Car 282 Cro Charles 282.

This frequently the case that one may be the legal proprietor of a promise or other obligation when the beneficial of such obligation belongs to another so also one may be the legal title to land or other property when the equitable beneficial interest belongs to another in such case he is said to hold it in trust or to the use of the cestui que trust & may be compelled to pay money collected on such obligation or the interest arising from such property over to the cestui que trust or he who has the beneficial interest & is liable to the cestui que use in the action of Indebitatus Assumpsit

This a general rule that the cestui que use cannot sue the original obligation in a Court of Law but he is liable only to the legal proprietor.

But there are some exceptions for in one class of cases the cestui que use has been allowed to sue the original obligor in a Court of Law which is where parol promises are made to to one in trust for the use of a near relation of the promisee as where one promised to a person to pay a sum of money to his daughter she was allowed to bring her action of Indebitatus Assumpsit directly vs the obligor 1 Ven 318.

Reeve thinks there would be no difference in principle

between the case above & one where the beneficial interest belongs to one that is not a near relation or where the obligation is by bond or other specialty no distinction could be made by our Courts

In Con in the case of an appeal from a Judgment for a suit assault & battery by the defendant & the Judgment paid by him without carrying up the appeal — the County had a beneficial interest in the Bond entered into by the Defendant for the appeal (tho it was in the name of the Plff) who was the legal proprietor) for on the conviction of such assault & battery a penalty is inflicted to the county & in this case the States Attorney brot Indebitatus assumpsit in favor of the County stating the particulars of the Bond & recovered.

So also the Circuit Court decided a case in Vermont (Allen vs Allen) John Allen having executed a Bond to Henry Allen for the benefit of his daughter Henry Allen died & appointed John his Executor John could not sue himself neither would he discharge the Bond to the daughter an action of Indebitatus assumpsit was brot & a recovery was had in the name of the daughter & tho it is clear a Court of Equity would relieve in this case.

G. thinks the ground in Eng on which a son or daughter is allowed to sue on a promise made to their father for their benefit is this the Court considered him a guardian or agent to them as their is no [illegible] of an action brot by any other relation

Dunlap says in his practice N. York Courts 6 page 1 vol

"Assumpsit is brot in its special form in a number of instances & necessarily varies according to the nature & provisions of the contract

Of these the most usual are actions on Bills of Exchange & promissory Notes: on policies of Insurance not under seal: Parol submissions to arbitration: Promises in consideration of forbearance or exchange of Goods Guarantees: promises to Marry: for not accepting goods sold: or delivering goods purchased Warranties in the sale of chattles: against carriers & other bailees for the loss of or injuries to the Property bailed for the non performance Parol agreements to convey real estate: by Landlords

Servant for the breach of the Implied contract to use the Caution a husband like manner: against an Attorney, Surgeon or other person exercising a profession on his implied promise in good faith & diligence on mutual promises: on a foreign Judgment or the decree of a Court of Chancery directing the payment of a specified sum of money. (3 Bac 68) The General or Indebitatus Assumpsit which lies on a promise express or implied to pay a precedent debt for money had received by the defendant to the use of the Plaintiff for Services work & labour. the sale or hire of Goods to recover the consideration money for the purchase or assignment of real estate: (14 Johnson Rep. 210) for the use & occupation of land houses &c. 2. The Quantum meruit or valebant or a promise generally implied to pay the Plaintiff for his work & labour as much as he deserved to have or for goods sold as much as they were reasonably worth: 3. The insimul computassent (accounts settled) or a promise, either expressed or implied to pay the sum due on an account actually stated between the parties: (as to proof see 8 Johns Rep 439. 14 Johns Rep. 418. 12 Johns 90.) If a party have a security of a higher nature he must found his action thereon, & assumpsit cannot in general be supported when there has been an express contract under seal. (1 Cranch 332.) or of record but he must proceed in debt or covenant when it is under seal or in debt or scire facias if it be of record, even tho the debtor after such contract were made expressly promised to perform it. (1 Chitty on Pleading 94. Cowper 129. 1 Maule & Selw 574. 575.) But assumpsit will lie on a promise to pay the balance of money due on a covenant. (2 Term Reports 479. 12 Johns Rep 227. 402. n. a.) or if a new consideration as forbearance have intervened & the defendant promise to pay the debt assumpsit will lie (1 Chitty Pleading 95. 1 Cranch 334) & where a contract under seal has been put an end to without the default of the Plaintiff he may recover back money paid in pursuance it is an action of assumpsit for money had & received (1 Caines Rep 47. 3 Johns Rep 509.)

where a valid security of a higher nature as a Bond. Judgment is accepted in satisfaction of a simple contract of debt the latter is said to be merged in or extinguished by the former & it can never be made the foundation of an action (7 Cranch 303. 3 Johns Cases 180. 2 Johns Rep. 213. 6 Johns Rep 90). (But where the higher security is collateral merely to the original debt & not intended as a satisfaction or discharge of it, the Plaintiff may maintain an action of Assumpsit even though he has obtained Judgment (13 Johns Rep 404)

As it was formerly supposed that a Corporation unless authorized by Statute could only contract by deed under its corporate seal it was held that Assumpsit would not lie against a Corporation: But this notion however the law may be in England is in this Country now completely exploded & a corporation is liable in this form of action on a promise whether express or implied. (7 Cranch 299. 12 Johnsons Reports 227. 14 Johns Rep. 118.)

It appears to have been some time a question whether an action of Assumpsit or indeed any other action could at Common Law be supported for the recovery of a pecuniary legacy: But it is now settled that this action may be maintained against a devisee upon his express promise to pay a pecuniary legacy charged on the land devised made after the executors had assented to the Legacy in consideration of his having become seized of the land under the devise (7 Johns Rep 99. 3 Johns Rep. 189.) & circumstances such a part payment may be equivalent to a promise (10 Johns Rep. 30.) See Commencement. Chitty's pleadings 3 vol for precedents in Assumpsit

Where a Bond & Warrant of Attorney had been given as security for an usurious loan & Judgment entered up, which was set aside by the Court on the application of the Debt who afterwards promised to pay the original debt. Held that notwithstanding the usurious security the money actually lent remained a debt in Equity & conscience & was a sufficient consideration on express promise & that indebitat Assumpsit would lie on such promise 14 Johns Rep. 196. The Plaintiff had Judgment on bringing into Court the Bond & Warrant of Attorney or usurious securities &c

A Judgment fairly obtained in another State is conclusive evidence of a debt Assumpsit therefore does not lie on such a Judgment 116 - 19 bol Johns Rep

Where a note made in renewal of a former note on an usurious consideration, was passed by the Deft to the Plff in part payment of the consideration for the sale & conveyance of land & the Plff sued the Endorser of the Note & failed to recover on the ground of usury: Held that the Plff might maintain an action of assumpsit vs Deft to recover the amt on the original contract the note being considered a nulity 294. 19 Johns Rep

Assumpsit will not lie on a Judgment of a foreign Court for Damages & costs in an action of Ejectment in the name of John Doe or the nominal Plff Doe vs Penfield 308 - 19 vol John Rep

A Plaintiff cannot recover on an Implied assumpsit for the value of Goods delivered by him to the Deft. Where there was an existing written Contract under seal in part performance of which goods were delivered Wood vs Edwards 205 - 19 vol John Rep.

Assumpsit for money had recd. does not lie vs two Defts without showing a joint contract or that both recd. the money 109. 427 Johns Rep

Where S. being indebted to M. G. D. & K. severally confessed a Judgment to them jointly to secure their respective Debts & the Property of S. having been sold on an Execution under the Judgment & the proceeds being less than the Amt of the debts G. D. & K. divided the money between them to the exclusion of M.: Held that M. could not maintain an action of Assumpsit for money had & recd. vs G. D. & K. jointly to recover his proportion of the proceeds of the sale of the property of S. under the Judgment & Execution ib.

Where a Plff purchased of a Constable on a sale under an Execution issued from a Justice Court all the title & interest in a lease or term for years & paid part of the purchase money & the constable refused to execute a conveyance or return the money; Held that there was a failure of consideration: for such an interest in land or leasehold property could not be sold under an execution from a Justice Court & that the Plaintiff was therefore entitled to recover back the money he had paid 3 Ier 19 vol Johns Rep 579.

Labor & services voluntarily done & performed without privity or request however meritorious or beneficial it may be it founds no ground for the action 28 — 20 Johns Rep

To entitle a purchaser to recover part of the con=

-ideration money paid on a contract for the purchase of land he must show that he has tendered the residue of the purchase money & a... a deed, so as to put the vendor in default Hudson vs Swift &c. What of his ... [illegible]

Whether the purchaser must not prepare & tender the con-=veyance to be executed by the vendor &c.

Where the consideration money is expressed in a deed to have been paid to the grantor, & has not in fact been paid he may maintain an action of assumpsit vs the grantee to recover the money agreed to have been paid — it not being within the Statute of frauds 338. 20 Johns Repts.

A promise by the assignee of a contract to pay the money due thereon when collected by due course of law is broken if the promisor suffer a term to elapse after the money is due, without prosecuting therefor: & this especially when he is directed by the promisee to proceed in the collection 98 — 1 Cowens Rep.

An adjournment in a justices Court is a sufficient consideration for a promise & that appearing upon the face of the contract in writing takes it out of the Statute frauds. Assumpsit is the proper form of action upon such an agreement this not recognizance 99 — 1 Cowen Repts.

In assumpsit by A vs B. for depasturing & keeping on hay the cattle of B. at his request on land in A.' possession B is estopped to shew that the title of the land was not in A. but in B. at the time the services were performed 248. 1 Cowen Repts

When a Demand must be made

(There are some cases when you cant bring an action until you have made a demand of the Deft & in such cases you must state a demand of the Deft in your declaration even if after verdict Cro James 523.

It is difficult by the English authorities in what cases a formal demand is necessary. (Reeve says the rule is clearly this If from the nature of the obligation the Deft cannot discharge himself from the obligation by a tender a demand must be made as when a man gives a Note to pay 10£ in Teaming when called upon a demand must be made

So if a Blacksmith gives a Note to be paid in his work when called for he cant discharge i-

by tendering the value in Hoes & Axes for he cant oblidge to take what he pleases a demand must therefore be made

So if one promises to do work for me as to build a House He cant discharge that Demand when He pleases a demand must therefore be made

But when an obligation is pay a sum of money or any thing certain as 20 £s worth of Hoes or Axes a demand is necessary

There are cert[illegible] arising from custom [illegible] when there can be a tender yet there must be a demand

By custom of Merchants a Note or due Bill in goods given by a Merchant means that it shall be paid in such goods as the Merchant has on hand called for a tender therefore of such goods as the Merc. pleased would not discharge the demand a demand must therefore be made.

Tho in ordinary cases a Note to pay a sum in goods must be paid we [illegible] as between persons not Merchants & a Tender of Mercantile goods unless described would discharge it

Monies payable out of the public funds must be demanded before suit can be maintained for it can not be supposed that the Treasurer is to look up the Cr.

So to recover money paid on a contract when the grantor cant convey a demand must be made [illegible]

In what cases Notice is necessary

In some cases you must give Notice of your demand to your Dr. before you can maintain a suit vs him & in such case you must state a Notice in your declaration or it is fatal & not cured by verdict & in such case a formal demand is not necessary Cro Jam 523.

In all cases where one is indebted to you & does not know it you must give him Notice of those facts which make him indebted & it is sufficient & herein it differs from a demand as if I employ a man to do business for me at Hartford for which I agree to give him $30 in this case I am not indebted [illegible] he does the [illegible]

not liable to be sued until I am notified he has done it
Holt 51. 68. Cro James 183. 525.

So where the Drawer protests a Bill of Exchange or
else order the payee to notify the Drawer before he brings
his suit vs him Holt 51. 68. Cro Jas 183. 523.

It has been determined that when the fact which
causes the indebitedness is notorious no notice need be given
as when one promised to another a sum of money when the
promisee got married & But Reeve doubts the
propriety of this case for marriage death & births are
not always notorious Cro James 183. 523.

If two persons enter into an agreement each to
do a certain thing as if one agrees to build a House
& the other to pay a sum of money a parol promise by
them before any right of action is attached on either side
to this up the agreement is binding on them, & bars any action
which might afterwards ensue on that agreement but if
one has a right of action already attached this promise is not
binding on him for there is no consideration Cro Jas 620. Cro C 384
1 Mod 205. 2 Mod 44. 1 Sid 177.

Averments

When one's right of action depends on something
to be done on his part he must aver & prove a
performance or his declaration is ill & not reasonable
nor cured by verdict as when one agrees to deliver
another a horse & the other agrees to pay him £50—
here the one that is to deliver the Horse must tender
him at the place of deliver or he can't maintain his
action for the money the other in order to maintain
his action & entitle him to one for the Horse must be
at the place of delivery ready with the money Cro Eliz 292

But in case of mutual & Independent promises
or when one is in consideration of the other each may have
their action before they have performed on either part Cro E. 292

In some cases promises are concurrent & it is
impossible which is first to perform as when one promises
to pay 200 Dolls to give a deed of a parcel of land & the other
promises to give £200 — it is said in such case neither

would be entitled to his action until he had performed or offered to perform on his part of the bargain before an offer to perform on his part stands just as the case where one offered his horse for $50. & the other agreed to give it tho neither had tendered an averment must therefore be made of ones offer to per=form Cro E. 292.

In some cases the manner of performance must be averred which is when one agrees to do an act which is required by law to be done in a certain manner as to exe=cute a release Deed &c Cro E. 292.

The words altho often requested & demanded are usually alledged in a declaration whether a demand is unnecessary or not but when they are not necessary they are mere allegations of form & not necessary to be proved & R. thinks the declaration would be good without them

It is not sufficient to state in Indebitatus Assumpsit that the Deft became indebted & being so indebted assumed but must also state how he became indebted Cro Jas 206. 1 Sid 182. Carth. 276.

Defence In an Action of Assumpsit

The Defence called the general Issue non assumpsit puts every thing contained in the Declaration necessary to support the action on the Plaintiff to prove

The Deft may show any thing under the genl issue in Eng. an action of assumpsit which goes to show that he is not liable at the time the plea is put in & he may give in evidence that he did promise & that he is released.

Non assumpsit does not therefore imply that the def never did contract but it is considered as a technical term — Hence the rule that Tender of payment. Payment, Release, award accord & satisfaction &c may be given in evidence under the genl issue & non assumpsit as under the genl issue nil debit which is in the present tense Bulr N. P.

It does not follow of course that because these several defences will support the genl issue non assumpsit you are obliged to plead the genl issue in such case but you may plead in other that goes to show

that you are not now liable on your promise specially & place it on the record the rule is that you may not plead specially what amounts to the genl. ie that which shows that you never did promise. But it is easy to see from the above rules that there are many defences that will support the genl issue that do not amount to the genl. issue

Formerly in case of an express promise any thing that admitted that the defendant was once liable on the promise could not be given in evidence under the genl issue but must have been pleaded specially but now you may give it in evidence under the genl issue & the rule is the same now whether the action is brot on an express or implied assumpsit

Tis said that there has been one decision to that effect & that the Statute Limitations must be specially pleaded the reason is said to be this that such defence contradicts the genl issue & does not go to the gist of the action but this rule totally confounds the principle & there would be the same reason as a release being given in evidence under the genl issue

In Con the rule of pleading is different by Statute It is enacted that if the Deft in any action is saved from his liability by some lawful act of the Pltff that he shall plead it specially & place it on record as a Release Record Satisfaction &c but all other defences to any action may be given in evidence under the genl issue therefore Statute of Limitations may be.

The Plaintiff in an action on an express promise under the genl issue must prove his promise in substance precisely as it is laid in the Declaration or he cant recover & if any requisite is wanting to make the contract a good one apparent on the declaration the Deft may demur to it except the Statute requisite of reducing the Contract to writing which need not appear from the declaration.

But every requisite or ingredient to a contract does not app in a declaration in an action on Indebitatus assumpsit but tis sufficient that the

Plea shew a right to recover

When one pleads specially to a declaration he take the onus probandi upon himself to shew the truth of his plea

Tender

In What cases Tender must be made

Tender above and for the an offer made by a Dr to pay a debt due from him to his Cr

A tender may be made in all cases when the Indebitoness is ascertained so that it is certain. But when the debt is not ascertained as were it stands in damages tender cant be made

A tender when it can be made is always a bar to an action

A tender is some times alowed by Statute when the damages are presumptive as by Statute Geo. 2d. as when one made an irregular distress he might tender amends.

When one has agreed to do a certain act at a certain time he may tender his services.

The effects of a Tender

It is a maxim of law that a tender of payment shall give the Dr all the benefit which he would derive from actual payment if it shall discharge him from the debt.

Where a tender is prevented by the Cr or when it is by his fault that a tender cant be made an offer by the Dr to tender or if the Dr shew that he was ready to tender will operate as beneficially to him as an actual tender Co Litt 210.11.

A tender of payment of a debt secured by a pledge destroys or discharges the Crs Lien on the thing pledged & the Cr may be sued in Trover for it

A Tender not only discharges the pledge but it also discharges the debt so that it will bar an action brot for that debt tho where the tender were a sum of money some have had different opinions.

When a debt is payable in collateral articles a tender according to the terms of the Contract wholly discharges the Dr tho from his Contract tho may leave the property so tendered at the place of tender & is no way liable for a loss of it.

But where a debt is discharged by money it is said by some that a tender does not discharge the debt & that the money does not vest in the

this is not true the money does not vest in the Cr. the idea that the money does not vest in the Cr. arose from the duty which the Law imposes on the person who tenders money to keep it for the Cr. but the obligation which the law imposes on him cand be the same that he was under before the tender. The Law only imposes on him the obligation of a Bailee & Reeve says only that of a naked bailee or Depository.

The Law obliges the Dr. to deliver the Cr. his money when he demands it or he shall loose the benefit of the Tender except the benefit that it will stop interest from the time of tender to the demand but after demand interest will revive.

If a Dr. should be sued on the Dbt after tender he must carry the money into Court & must plead that he tendered & ever since kept it ready for the Plff & the Plff can get only the sum due & the interest at the time of the Tender & the Dedft will be for Deft to recover his Costs. The consequence of the money vesting in the Cr. will be that the Dr. will be considered only as Bailee or Depositay therefor in case of loss of the Money the Dr. will be liable only in case of fraud so too if the money depreciate the loss must fall on the Cr. Bac 5. 6.

But in case of a collateral article the law has never imposed the Duty on the Dr. so agreeable to the above rules if one is ready to tender & does not because it would be nugatory owing to some act of the Cr. still if he was ready to tender the property or money will vest.

Reeve supposes that if after tender & refusal of money due on a Note if the Indorsee would deliver up the Note that he might bring his action of Account vs the Indorser for the money. Brown 2. 91

To illustrate the principle that a Dr. derives all the benefit that he would from actual payment suppose A agrees to make a Lease to B. on B. paying him $20. B. tenders the sum agreed for the lease which A refuses to ...

B. may bring an action on the Contract & recover the value of the Horse or Chancery would decree a specific performance of the Contract. Tho, the money remains in the hands of B. & all this appears reasonable when we consider the money as vesting in A. the tenderee & B. retains as Bailee (merely & as such is liable for it Cro Jas 245. 1 Sal 75. Cro E. 889. Stra 777.

But it appears that Courts in regard adherance to this principle in one set of cases have done injustice as where A. agreed to give B. 120 Dolls to build a House B. prepares the materials & appears on the ground to build A. Commands him to quit the premises & B tenders his services A. refuses to accept & B. in an action on the Contract recovered the price agreed to be given for the building but A could not compel B. to build the House. In all cases where after tender & refusal the tenderor is not liable to perform on his part he ought to recover only the damages which he has sustained 1 Ray. 686.

So that the effects of a Tender has been considered in this light by many Eng. authorities 1 Bac. 5. b.

Tho a tender of collateral property is not obliged to take it again into his custody for its safety Yet there has been a decision in Con in favor of one who thus took care of Cattle that were tendered tho not requested.

Tho, it seems to be no more than a voluntary courtesy unless they went on the ground that it was an act of Humanity.

Of the reasons why a man does not make a tender is because it would be nugatory on account of some act of the tenderee he may plead that he was ready to tender or offered to tender & the will vest the property in the Tenderee & if a loss should happen without the fault of the Tenderor it must fall on the Tenderee.

As where a man gives his Note payable in a certain kind of money & obliged was out of the realm & left no agent to receive it the money having depreciated after the time that the obligor was ready & offered to tender at the time when it was due the loss it was holden fell on the Tenderee 1 Bac 5. b. 2 Lev. 209. 3 Lev. 104.

1. What acts constitute a good Tender

A Tender includes in it a manual delivery therefore when there is a person to whom it is proper for you to tender you must actually offer it, tho he has refused to accept 2 Bac. 209. Lutch. 70

When you tender you must tell for what purpose you tender & tho he has but one debt [on] you you must tell for what purpose you Tender tho. he has but one debt [on] you but if he has more debts than one it is at your option which debt you will have the sum applied on Lutw. 70 2 Bac. 209.

But tho there must be a manual actual delivery yet a tender of money in a Bag if you offer the Bag, is sufficient for it is his business to count the money & if he takes too much or takes it at his peril & is liable in an action of Indeb. debitatus assumpsit 5 Co 115 Lutw 70. 2 Bac. 209.

But you must be sure to tender enough or the tender is good for nothing In Con. when a Tender [was] short 3 farthings it was held no good Tender (Quere) Minimus non curat lex (The Law dont care for little things)

It is now settled that if you tender a larger sum the tender is good tho formerly doubted Strang 916.

It was formerly holden in Eng that when a debt was payable in money non but money current by proclamation would be a valid tender except where a particular species of money was necessary But it is now holden that any current money by general assent may be tendered (except an unreasonable quanty of Coppers may not be tendered) Bank Bills it has been decided in Chancery & at Law to be a valid Tender when the Tenderee made no objections Bac 17. 3. Term Rep 554.

But in Con Bank Bills want that currency which they have obtained in Eng. it is, probable they would not be held a legal Tender.

It is settled that a Tender & acceptance of counterfeit money. the Tenderer supposing it to be good will discharge the debt & the Tenderer's remedy is gone

[illegible]

on the Note but he might compel the Tenderor to give him good money for the Counterfeit Co Lit 208. 5 Co 115.

The Plea of Tender

If there is a Plea of Payment pointed out by the Court the tender must be made at the place to discharge the debt.

But if there is no place pointed out for payment by the Contract & it is payable in money. Tis a gen rule that you must tender to the person of the Cr. Provided the Cr. is within the Realm in Eng or in the United States Co Lit 210.

But if the Cr. goes off at the time of Tender or is unreasonably absent from Home so that you cannot get to him after you hear of his absence you may tender at the usual place of abode which is the place always contemplated by the parties unless there is one specified But if he removes from one State to another or any where in the United States & the fact of removal is notorious so that you can get to him you must tender to him Co Lit 210.

So if I go into New York to tender money to my Cr. this shall give me all the benefit of a Tender unless I can get to him by the time of Tender & then I must follow him Co Lit 210.

To the above rule there are two exceptions in Eng. Tenants are not obliged to follow the person of their Lords But may tender on the premises which they hold of their Lord. so also Money due on Mortgages It is said that the Mortgagor may appoint a place to tender Reeve thinks this could be Law unless it is in case where it is reasonable 2 P. Williams 378.

Tender of Collateral articles

There but few authorities to this point. But it seems where there is no place appointed you must make application to the Cr. to appoint a place

If he will not follow of course that you are obliged to Tender at the place appointed

(30)

by the C— if you appoint a convenient place
ai your — ty to Tender there & always a Tender
in such place will be good

But if there is no place appointed
you may tender at the usual place of abode
of the Cr. at the time of making the contract

A Tender of debt after action brot is
not good at Com Law. but in Equity it is good
so too in Con — Tender may be made
at any time pending the suit if you can ascertain
the debt & costs up to the time of Tender & so it may be
in Eng. But by a Rule of Court in such parti-
-ular case but a tender of collateral articles is never
good after the day of payment for the Cr. may demand
the Money –

Time of Tender

An obligation payable on or before a certain day
it is now settled that the last day (tho formerly doubted)
is the only day on which a valid Tender can be made
Plow. 172. 7. 5 Co 114. 114. Cro E. 14. 75. except when the
parties can meet before the last day then a tender is good
Co Lit 264. Co 92.

A Tender must be made on the most convenient
part of the day. Yet if the parties can meet at
any other part of the day it will be good Co Lit 21

A Tender must be made when there is day light
enough to examine a tender Cro E. 14. 8 Co 92.

But notwithstanding the above rules the Tenderor
or debtor must always have sufficient time to complete
the Tender R. says if the Property is such that he
cannot complete the Tender in one day he may begin the
day before –

It was formerly Holden that a Dr. might
appoint an hour to tender & a tender at that time of
the day would be good tho it does not seem to be Law
now Sal 627. Stra 777.

By Com Law when day of payment happens
on Sunday you may Tender on Monday but by the Law

Merchant you must tender on Saturday.

To whom a Tender is to be made

Payment therefor tender is generally to be made to the Cr. But it may be proper & even necessary to tender to some other than the legal Cr.)

If a promise be made to A for the benefit of B. you must tender to A. but this rule Holds only I presume in those cases where the 3d. person can sue on the promise but in those cases where a promise is made to one for the benefit of a near relation (see page 200.) Cro E. 775.

When one person is the Equitable of another the legal owner of a note you must sometimes make payment or tender to him & not to the legal owner as where A gives a note to B. a Bankrupt, B. assigns it to C. now if C. orders you to pay the Note to him or if you have Notice of the assignment & it is an inconvenient to pay it to the assignee you must or you will be liable to pay it again the assignee

But if there a place appointed to tender in the Note & no other one appointed by the assignee or if you are to be put to much greater inconvenience to tender to the assignee as where he lives at a distance & leaves no agent to receive the payment you may be safe in tendering to the bankrupt obligee Moor Rep 37.

Reeve thinks in such case when it is the duty of the obligor to tender to the assignee that a tender to the original obligee would be satisfactory.

But when the legal interest in a note is assignable the obligor (unless there is a place appointed) takes it upon him to pay to the assignee at all events.

Of Pleading a Tender

In pleading a tender in bar your plea must be good like all other pleas in bar by not omitting the facts stated in the declaration — you must state in your plea the day on which you tendered & to be a good plea it must appear that the tender was on the right day you must also state that you tendered on the most convenient part of the day Cro Car 423. Ld. Ray 688.

But when the parties meet at your mansion

tender after an obligation becomes due (tho you can not before) it is not necessary that you state the tender to be on the day pointed out or on the uttermost convenient part — But when you tender at any other than the one pointed out by the Court you must state that you & the Plaintiff meet together & that you Tendered (naming the sums) ~~it is not necessary that you state~~ & that the Plaintiff refused to accept the money unless you meet the Plaintiff at the place But it is sufficient that it appear on record that you was at the place & ready at the time But it does not appear on record in your plea that you have done every act essential to make a good Tender it may be demurred to 1 Sid 13. 2 Lev 23 — 2 vent 109. 1 Sal 113. Cro Eliz 765. 889.

But nothing will avail you at any other time except the time pointed out for payment but actual tender to the person of the Cr. as where a note is payable on or before a certain day the certain day is the only time you can make a Tender unless you can make it to the person of the Plaintiff which may be done either before or after the time appointed

A Cr. is never obliged to receive money on an obligation before it is due the tender to his [illegible]

You must always state that you have had the money ready for the Plff & that you have it now ready & that you tender it in Court & you must actually tender it in Court for every fact which you state in your plea you must prove if denied 9 Co 79 Co Lit 207

It is supposed by some that the same averments would be necessary when Jewels or demands are tendered or other [illegible]ble articles which are of so little weight

The [illegible] may reply to the Defts plea of Tender a demand after the Tender & refusal of the Deft the Defts plea will not avail him only to stop the interest between the Tender & demand

But if the Plff shoulo demand it of him when he was not at Home unless he had the Money with him it would not avail the Plff

But such a specification when the Tender is of collateral articles is not good & may be demurred to even tho the Defl take the property into his custody after the Tender but in such a case the proper remedy for the Plff is Trover for the law does not obliege the Defl to take any care of the goods after tender but allows him to prevent their being discharged & Reeve thinks he would be entitled to a compensation of the Ct. for the keeping & taking care of them.

The Defl cant therefore bring Trover in such case until he has made a demand

When some specific act is to be done as to build a House a tender of such services discharges the tenderor from all damages in consequence of the contract

Accord & Satisfaction

An accord & Satisfaction is when one has a charge upon another as a debt or duty & agrees to take some thing of the Dr in lieu thereof distinct from the debt which must be of some value

This accord when well pleaded is a good bar as all personal actions with a few exceptions

But laid down in the Books that accord is no good [illegible] to Bonds single Bills or to Covenants

The principle is this that it is a maxime of law that an obligation must be delivered by some thing of a higher nature or as strong as the objection it self

But this rule must be taken with the qualification that the debt or duty grows by the Bond it cannot be discharged unless the discharge be of a higher nature as the Bond itself therefore nothing will discharge it but a sealed instrument Co Lit 64 Co Barbon 99. 1. 2 Mod 86. Cro C. 46.

When there are several Jointly or Jointly & severally liable an accord & Satisfaction by one may be plead in bar by all 9 Co 79.

An award to pass lands is not good for you cannot change the title of lands but by a particular mode of conveyance an accord might lay the foundation for the interposition of a court of Chancery to compel one to convey land

The requisites to accord

It is laid down in the Books that an accord must lie for a full satisfaction but you must not understand by this term. It must be of full value to the debt or duty it is in lieu of for if an accord is not good because it is not in full satisfaction it is because the thing accorded or agreed to be done is no consideration or of no value but if it is of any value it is deemed in law a full satisfaction therefor if one agree to discharge a Trespasser for a pint of wine it is good tho this trespass is ever so great But when one took possession of another land & goods wrongfully & when sued he plead that it was accorded & agreed between him & the Plaintiff that the Plff should again have possession of his land & good in full satisfaction of the injury & it was determined on good plea it is no consideration or satisfaction as when an action is brot vs one for not repairing a House which he had agreed to do the defendant plead that it was accorded & agreed between them that he should repair in future in full satisfaction for the injury which was held ill on Demurrer 2 Mod 88. 1 Roll 12.

A release by a Mortgagor to a Mortgagee of an Equity of redemption was held not to be a good accord as an Equity of redemption is of no value in law 2 Vent 86

No satisfaction in point of Honor is good as were one plead to an action of slander that it was accorded & between him & the Plff that he should acknowledge the slander in full satisfaction & that he did it & this is no good accord for the thing accorded to be done must be of some value to the Plff Roll Abr. 128. 9

If it is disclosed on the face of the accord that there was no consideration for it it will be good for nothing Therefore an accord that one

greed to receive a less sum than was due on an obligation is good for nothing. So when an obligation was to pay 20 yoke of oxen an accord to accept of five is not good &c Stra 426. Cro E. 193.

Tho a compromise by a Cr. with their Dr. who is in failing circumstances to take a less sum than is due will bind them.

But when an obligation is payable in money an agreement to accept of collateral articles of ever so trifling a value is good & so vice versa or when the obligation is payable in collateral articles &c in such case a collateral article of a different kind is a good accord: For Courts in such do not know but what a Beaver Hat or a pair of shoes &c are of as much value as a 100 £s or 10 Yoke of oxen. Stra 426. Cro E. 193

2. An accord to be good must be certain & definate on the face of it th[illegible] an accord that one shall work 2 or 3 days in lieu [illegible] debt is good for nothing so also it was holden that an accord by [illegible] to relinquish his Dwelling House is not good it being uncertain both as to the manner & to the time (Selw 125.

3. An accord to be good must also be executed i.e the thing accorded or agreed to be done must be actually done or paid it must be accepted in lieu of the debt by the Cr. therefore if one owe $100. & the Cr. accept of a Ton of Iron in lieu of it still tender of the Iron will not discharge the debt unless accepted by the Cr. tho he might be liable on his agreement to accept it 9 Co. 79. 1 Roll 129. Th. 203. Wil. 69 Cro E. 305.

So if one have a debt now due vs another & agrees with the Dr. to accept of some thing in lieu of it 6 months since this agreement will not bar the right of the Cr. to sue at any time before but if he does not sue before & accept of the thing agreed, it will be his right to sue.

Statute of Limitations,

There are certain Statutes which limit the time for bringing actions which are different in different States

But unless a person who has a right of action sues within the time limited by the Statute he is barred of

right: These Statutes were made for the purpose of compelling people to settle their contracts in the lives of them - whilst they had evidence of the Justice of their claims

But notwithstanding the Statute & the lapse of time limited by the Statute there are certain cases which are said to be taken out of the Statute or the Statute has not run upon them (as the expressions are which are used figuratively) & the Plaintiff in an action brot on such contract on the promise is allowed if the Statute is pleaded to reply certain facts which will entitle him to recover notwithstanding the Statute & lapse of time & yet seems now to be settled that if the Plaintiff can prove any act of the Defendant that amounts to a waver of the Statute he is entiled to recover at any time the Statute notwithstanding 5 Burr 2628. Carth 471 5 Mod 424. 1 Salk 29. 2 T.R. 760.

It seems that the Statute of Limitations before it has run upon an obligation will have no effect upon it i.e. a waver ... promise to pay it tho I suppose a promise never to take advantage of the Statute would be binding tho made at the time of making the contract.

It is pretended by some that the Statutes of Limitations were made for the purpose of reducing to a certainty the presumption that a debt is paid after such a lapse of time therefore according to this opinion that which & nothing else rebuts this presumption will take the case out of the Statute which merely throws the onus probandi off from the deft on the Plff

But there are many difficulties which will rise in considering this as the true ground on which Courts proceed under the Statute in allowing the Plaintiff to recover after the time limited by the Statute

It has always been holden in Chancery that if a Man wills that his Executor pay all his debts or if one publish in the Newspaper or otherwise that he will pay all his debts That debts barred by the Statute of Limitations are also to be paid 3 P. W. 84 2 Vern 141. 2 Cha 385 3 Atk. 107. Cowper ...

to ... If Courts proceed on that ground in this case

there would be as much reason in compelling one who has advertised that he will pay all his debts to pay those debts which he has paid over again as those barred by the Statute for according to this opinion they are no longer debts.

It is also laid down by some that if the Pl can show an indebtedness that is sufficient to take it out of the Statute but this is not true for it has been determined that when one acknowledges a debt in such a manner as to show that he did not intend to waive the Statute tho' no action will lie as when one said I know I owe you a debt that I have never paid you I'll never mean to as the Statute is in my favor

Reeve says the Statutes was made not to determine between the parties but to punish persons for not sooner settling their claims & as any person has a right to waive a right which is given him by a rule of law — so in this case the time & only ground on which a Pl is entitled to recover after the time limited by the Statute has elapsed is that of a waiver of the benefit of the Statute by the Deft therefore very slight words by the Dr. without any promise has been holden to be a waiver of the Statute or an acknowledgment of a debt by a Dr. without expressing any intentions to avail himself of the Statute has been holden sufficient to take the case out of the Statute 5 Mod 424. 1 Sal 29. 2 T.R. 760. 5 Burr 2628. Cartis 4

So in Eng pleading the gen issue to an action is a waiver of the Statute, but in Connecticut it is allowed to be given in evidence under the gen issue

Therefore one may acknowledge his debt & still avail himself of the Contract Statute But unless he expressly shows that he means to avail himself of the Statute such acknowledgement shall be held a waiver of the Statute 5 Burr 2628. Cartis 471.

It has been said by some that the action must be brought on a new promise to pay the debt & that the old one is extinguished But this rule is not true tho Reeve thinks it might be

brought on the new promise when the wave amounts to a promised expressed or implied) for an action this wd be established may be brought on the old promise but it is sufficient that you can shew a wave of the Statute, whether before or after suit brot Carth 467. 5 Mod 416. Salk 29. Cro Car 150 or 160 2 Burr 1099. 2 Bent. 251. 1 Bent 191.

A wave of the Statute of Limitations by one of several joint obligor is a wave as to all so as to take them out of the Statute Doug 629. (Bent 151. or 251. but this case in neither is deemed not to be law in Espinasse (Fit Assumpsit)

Tho it appears from the declaration that the action is not brot within the time limited by Statute. yet it cant be demurd to because the Deft may have waived the Statute also because there is a Proviso contained in the Statute in favor of Infants Femme Covents &c & the Plaintiff ought to have an opportunity to shew this in his replication

In Eq. the Statute runs only from the time the right of the action accrues & therefore it is the practice to plead (now Assumpsit infra sex annos or that the cause of action has not accrued within 6 years 2 Salk 421. Peth 148

But in Com Law Statute runs from the time of making the Cont. as no parol Cont. can be made that is valid But what is to be performed within one year from the making therefore no parol cont can be made but what is to be performed within the 3 years & all written contracts stand on the same footing as Bonds as to the Statute limitations.

In Eng. the Statute of Limitations must be specially plead but in Com it may be given in evidence under the gen issue 1 Salk 278.

The practice in the State of New York as given by Dunlap's very lengthy & believe able pa Vol 48. I shall transcribe or abreviate a part &c The plaintiff must commence his suit with a certain period after the cause of action accrued which varies according to the nature of the subject, otherwise his claim may be defeated by the Statute of Limitations - or by the Interruption which the Law allows in cases of Stated & anticipated

demands that they have been appointed to paid (By the Statute of Limitations ~~pep~~ 24. c. 183. (1R. L. 186. Stat. 21. Jac. 1. c 16. 3) It is enacted "that all actions upon the case & of account, other than actions of slander & actions which concern the trade of Merchandise between Merchant & Merchant, their factors or Servants & all actions of debt for arrearages of rent or founded upon any contract without specialty & all actions of trespass detinue & replevin of goods or chattles & actions of trespass quare clausum fregit shall be commenced & sued within six years next after the cause of such action accrued & not after. & all actions for any assault & battery wounding & imprisonment or any of them shall be commenced & sued within four years next after the cause of action accrued & not after: & all actions on the case for words within two years after the words spoken & not after. Provided However that if any of the said actions Judgment shall be given for the Plff & upon matter alledged in arrest of Judgment, the Judgt be reversed by error or if a verdict pass for the Plff & upon matter alledged in arest of Judgt. the Judgt be given vs the Plff that he take nothing by his plaint, writ or Bill or if any of the said actions shall be brot by original & the defendant therein be outlawed & shall after reverse the outlawry, in all such cases, the party Plff. his heirs, executors or administrators as the case shall require may commence a new action from time to time within one year next after the Judgt reversed or such Judgt given vs Plff or outlawed or reversed & not after:

Provided also that if any person entitled to any of the said actions shall at any time of the cause of action accrued be within the age of twenty one years, feme covert insane or imprisoned such person shall be at liberty to bring the said actions within the respective times above limited after such disability is removed & if any person vs whom any cause of any such action shall accrue shall be out of this State at the time the same shall accrue the person who shall be entitled to such action shall be at liberty to bring the same within the times respectively above limited after the return of the person so absent into this State.

There is no limitation of time

as regards suits in the admiralty for seamans wages (Ellison 477. (nor to a Bill in Equity for the recovery of a legacy 1 Johns Ch. Rep 313.

The provisions of this act apply as well to contracts made & to be executed out of this State as to those which are made here & is a Bar to an action arising in another country when sued upon in our courts although the time of limitation allowed by the laws of that country had not expired or they had prescribed no period of limitation (1 Cains Rep 402. & on the other hand if they had taken away the right of action this no objection to the suit here for the lex loci contractus applied only to the validity or interpretation of Contracts but to the time mode or extent of the remedy 3 Johns Rep 263.) so the act may be pleaded on a foreign Judgment which is considered of no higher nature than a simple contract

This a Bar to actions on accounts unless they are open or current 5 Johns Rep 132. 11 Johns Rep 168. 14 Johns Rep 479.) 2 Sanders. 124.) & directly concern Trade liquidated demands or Bills & Notes which can only be traced up to the trade of merchandize are too remote to come within this description (2 Gill Rep 200. 5 Cranch 15.) The Statute is to be construed strictly & not to be extended beyond its express words: so it has been held that a debt on an Indenture reserving rent is not within the Statute notwithstanding its terms: & the settled construction is that applies solely to actions of debt founded upon contracts in fact as distinguished from those arising from construction of Law: thus from a Judgment in a justices Court the law implies a contract but is at least of as high a nature as a specialty & therefore is not affected by the Statute admitting that such a Judgment is not a record.

Our Statute does not like the English Statute 21. Jac I. C. 16 save the rights of Plaintiffs absent from the State but adopts the exception

in the 4th Ann. C. 16. S. 19. in favor of creditors v. Def. coming from abroad. The word return used in the provision has never been construed to confine the exceptions to citizens abroad occasionally it has been considered as general & extending equally to foreigners who reside always abroad 3 John Rep. 263.

But this return into the State, which is to cause the Statute to commence running vs Pltffs demand must not be clandestine & with an intent to defraud the Cr. by setting the Statute in operation & then departing: it must be so public & under such circumstances as to give the Cr. an opportunity by the use of ordinary diligence & due means of arresting the D. (10 John Rep. 464.) It is said that notwithstanding the exception a defendant coming into the State may in the case of a stale demand avail himself of the presumption of payment: there has not however been any adjudication on this point. "When this presumption is to be let in says Kent C. Justice (3 John Rep 268.) will depend on the age & nature of the demand & the special circumstances under which it may present itself. We do not at present undertake to lay down any precise rule. It is sufficient to observe that this presumption of payment must as a matter of evidence be left in each case to be raised or repelled by the respective parties & in this way any serious inconvenience from the revival of dormant claims will be avoided. The period of Limitation is calculated from the time the action accrues or the liability is removed if there is any & when it has once commenced running it cannot be removed by an intervening disability (1 John R. 165.).

There is no statute of Limitation on a debt on Bond.

I shall now pass over 5 4. 5. 6. 7. & 8 pages of dunlaps & conclude with the Statute of Limitation as to Criminal Actions (Sess 11. C. 34 2 R.L. 122. post ch 3. sect 1.) That all actions informations & indictments which at any time hereafter shall be brought sued or exibited for any forfeiture upon any penal Statute, made to be made, whereby the forfeiture is or shall be limited to the People of this State only. shall be brought tried within 2 years next after the offence committed & that suits brot where the penalty is given any person, [illegible] shall prosecute for the same or to the People of this State & to any other who shall prosecute

in that behalf shall be commenced within 1 year & to the people of this State 'tis extended 2 years farther. The Statute gives 3 years the right of action for penalty is given to the party aggrieved.

By the Act of Congress of April 30. 1790. (2 Laws 99) no person shall be prosecuted tried or punished for any offence not capital nor for any forfeiture under any penal Statute, unless the indictment or indictment for the same shall be found or instituted within two years from the time of the committing the offence or incurring the fine or forfeiture with the exception of persons fleeing from Justice.

This Statute extends as well to penalties created by Congress after as before that act & to actions of debt as well as to informations & indictments. (2 Cranch 336)

Of Pleading an accord

An accord must be pleaded as an accord & not as payment on the debt for if you plead 'tis payment (tho it is strictly such) 'tis ill on demurrer therefore if a note is to be paid in a Horse a payment of money on the Note before the time of payment must be pleaded as an accord but if after the day of payment 'tis no longer a Note for a Horse but for the money & a tender of payment of money is good & may be pleaded as such

You must shew every requisite in your plea to make a good accord. the form of the plea of accord was formerly thus &c. the defendant in Court pleads &c. that it was accorded between the Plff &c. that the Deft should pay & the Plff accept of &c in lieu of the debt contained in the Note (as the case can be) & that the Deft in pursuance of the agreement (at the time of the plea) delivers to the Plff &c & that the Plff accepted of &c in lieu of the debt contained in the Note (as the case may be) & that the Deft in pursuance of that agreement at the time & place) deliver to the Plff &c & that the Plff accepted of the same in full satisfaction of said debt

'Tis usual in Eng now to plead thus the Deft &c &c in full satisfaction of the Debt contained in the Note which was in pursuance of an accord between the Plff & Deft Str. 573. 5 Mod 86.

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Award & Arbitrament

An award is the Judgment of two or more persons chosen by parties & called arbitrators upon some controversy between the parties & if it have all the legal requisites to an award it may be pleaded in bar to an action of apt or any other action brot for the same controversy provided the subject matter of the controversy is arbitrable except it cant be plead in bar to a specialty

Of Submission to Arbitrators

The submission to arbitrators depends entirely on agreement of the parties submit to them therefore the extent of the power of the arbitrators depends entirely on the submissions of the parties.

An agreement to submit to arbitrators & abide their Judgment or award will bind the parties so that they will be liable on the promise tho either party may omit the promise which vests with power the arbitrators revoke it before their Judgment or award but such revocation will in most cases subject the one who revokes to an action on such promise to submit.

A parol submission will bind the parties as much as a written one unless it is within the Statute of frauds & perjuries for the very fact of ones submitting at the request of the other is a sufficient consideration to bind the other to his promise implied in law

Of the effects of an award

When a controversy is submitted to arbitrators respecting some debt or duty & the arbitrators award a sum to one vs the other he may bring action of Debt or assumpsit to recover the sum so awarded.

When the controversy is respecting the title to some personal property an award of that property to one will vest the property in him & if the other retain it vs him he can sue in Trover & recover the value of it. So an award that one do some collateral act will vest a right in the other to have that right done & he may bring his action of the case for the non performance on the promise to abide the award

But it is said that the award of the title of land is nugatory or an award that one may convey to the other is nugatory void but this rule is not strictly true & the only objection to such award is that it cant be inforced for the title of land cant vest but by a certain conveyance Therefore if 2 submit to arbitrators the title of land & enter into a written agreement to abide the award & the arbitrators award that one convey to the other — this will not vest the land yet the party refusing to execute a deed in such case will be liable on his written obligation to abide the award tho. a parol promise wont be void by the Statute of frauds & perjuries it being concerning some interest in Lands 1 Sid Ray 115. 6 Co. 43. Co Lac 99.

The usual practice in Con. in such case is for the parties to execute deeds to each other of the land in dispute & deliver them to the arbitrators as Escrows because their act & deed as the arbitrators shall award. But such delivery will have no effect in Eng. as the land must pass instanter 1 Sid Ray 115. 6 Co 43 Co Lac 99.

It is also said that an award of a debt due by specialty in Eng is nugatory true it is that such an award can not be pleaded in bar to an action brot on that specialty in Eng. because it cant be discharged but only by specialty deed but the rule is otherwise in Con. & in Eng unless the party abide by such award he would be liable on his promise to abide 1 Sid Rep 115. Co Lac 99.

When the subject matter of the award is arbitrable it will be as conclusive between the parties as a Judgment in a Court of Law except they cant issue Execution to enforce their Judgments but the method to compel or enforce their awards is by a suit in a Court of Law & in many respects they have a greater power than a court of Law as in awarding a collateral act to be done which a Court of Law cannot do.

It was always holden that when the arbitrators award a sum of money to one that debt would lie in a Court of Law to recover the sum but an award

to do a collateral act could not be enforced two action would lie on the promise to abide the award 1 Ld Ray. 248.

It was afterwards holden that an action would lie on the promise to abide the award for the non performance of the collateral act provided there was a consideration for the promise 2 L. Ray 122. 6 Mod 35.

But it is now holden that the very fact of the submission implies a sufficient consideration so that now the only difference between an Award for a sum of money & to do a collateral act is in the remedy 2 L. Ray 961. 65

It is usual for the parties to give a Note or Bond to abide the Award & in such case if either party refuse to abide by the award he may be sued on such Note or Bond & the rule of damages in such case will be the sums awarded or the damages for the non performance of the collateral act to be done

Mode of Submitting

A parol promise to submit & abide the award of arbitrators is to perform the award is good & will bind the parties but the safest & most usual way is to enter into Bonds conditioned to abide by & perform the Award 2 Mod 73.

In Com. It is usual for the parties to execute notes to each other in a penal sum or for a much larger sum than he will be awarded & to deliver them into the hands of the arbitrators shall award for a parol condition in such case cannot be performed & the arbitrators will endorse the Notes as they Judge right & such receipt conditioned by the arbitrators Judgment in the case will bind the parties

It is usual for the parties in Engl. in Com. to enter into a rule of Court to abide the award which will give the one in whose favor the award is a further remedy for if the parties after entering into a rule of Court refuse to abide the award they are guilty of a contempt of Court & may be committed to trial for such contempt until they comply with the award

But in Com. it is enacted by Statute that when 2 or more persons submit to arbitrators by rule of Court

If a sum of money is awarded to one the Court before whom the rule was entered into shall issue Execution for such sums

In some States they practice (tho not known in Eng) for the parties to execute Notes to each other & to confess Judgment on them & deliver them to the arbitrators or to pray out Execution on such Notes & deliver them to the arbitrators to endorse as they please one is endorsed satisfied (thus rec. $20. by Judgt of arbitrators) & the person in whose fa[vor] the award is prays out his Execution or takes the one already prayed out & puts it in the hands of an officer to collect but such Execution has been declared void in Con for otherwise if the award was illegal still it could not be avoided

It seems there is one case when a contemplated controversy may be submitted tho there is no difference of the parties in esse at the time of submitting which is when partners when they enter into partnership may bind themselves to have any after dispute with respect to the partnership to A & B. or to arbitrators without naming them & such submission will bind them & this submission will be a temporary bar or suspension to any suit brot at law on such dispute but if one refuse to submit the other may treat the agreement as he does & sue him in a Court of law 2 Bro Cha 336.

This laid down by some that there must be a time limited by the submission for the arbitrators to act or the submission will be void but this rule is contradicted by modern authorities & it is settled that such submission will bind the parties provided the arbitrators call them before them in a reasonable time but if one of the parties request the arbitrators to call them before them & they neglect to do it in a reasonable time he may make the authority given them by the submission

Of Revocation of a Submission

In all cases a naked trust or authority may be revoked therefore the authority given by the parties to the arbitrators may be revoked but an authority

would ... a court of law to recover the sums due ...

with an intent can be revoked so as to take away that intent

Formerly it was holden that an authority given by writing could not be revoked 8 Co. 82. Brown Law 62

But it is now settled that a naked authority may be revoked in any case but of one party after he has submitted to the Judgment of arbitrators revoke that authority which he gave the arbitrators by his submission he shall be liable in damages to the other party on his promise to submit whether such submission was by writing or parol 8 Co. 82. Brown Law 62.

Where a submission is by Bond the rule of damages is not the sum contained in the Bond. But actual costs & damages will be given without any reference to the strict rule of costs in a court of Law.

In Cov. when one of the parties revoked the submission of the parties had appeared before the arbitrators in an action brot on the Bond to submit the Court allowed all reasonable expenses as arbitrators fees witnesses &c.

When the revocation is of a submission entered into by a rule of Court the parties in Cur must be (tho it dont appear from any authorities except in Tidd practice) to punish the person revoking for a contempt of Court. Reeve says this must be the practice in Cov. except when it is proper to sue Executors & thus they will proceed ex parte & the Court will sequester & keep on the award. tho some have supposed that a submission by rule of Court cannot be revoked but Reeve says it clearly can

Who may submit to arbitrators

It is clear if a person can enter into a contract he can submit & it is also said that no person can submit unless he can contract.

It is said that an Infant cant contract therefore he cannot submit to arbitrators But this is not strictly true an Infant can contract but he is not bound by his contract so an Infant may submit to arbitrators but he is not bound by their award.

Therefore if an Infant contract & an adult become bound for the Infant that he shall fulfill his

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contract his bondsman will be liable - It is therefore also now settled (tho formerly questioned) that if an adult enter into a Bond or promise that an Infant shall abide an award that such Bondsman is liable on the Bond unless the Infant perform the award Sutch 207 Comb 318; 3 Lev 17.

It is now settled (tho formerly questioned) that an Executor or administrator may submit any matter of his testator or Intestate to arbitrators to arbitration. But in Eng. if an Executor or Administrator submit to arbitration they do it at their own risque & if the arbitrators do not award as much as they could have recovered in a Court of Law they are guilty of a devastavit which can be determined only by another suit 1 T. R. 691.

It was formerly questioned but now settled that one partner cannot bind the other by a submission to arbitration without his joining 2 Mod 228.

An agent or attorney who is employed to transact business for another may bind the principal but tho the attorney signs as agent or attorney the principal is bound but if the agent or attorney had no authority to submit tho they are bound yet they are answerable to the principal

But it has always been holden that a submission by an Attorney by a rule of Court will bind the principal tho the Attorney had only a genl power ex officio or to transact the business 1 Ld. Ray 246. 1 Sal 70.

When several submit on one part & a Bond is given to one only he is to hold it in Trust for the rest as he only can sue on the Bond & if he recover on the Bond the rest may prefer their Bill in Cha. for their share of the Bond or each may have his action of Indebitatus assumpsit to recover his share but when they sue on the award not only the obligee in the Bond may sue But all may sue & perhaps must join

The Husband may submit to arbitrators any disputes respecting the wifes property which he can dispose of as choses in action Leases &c. & the wife after [illegible]

his death will be bound by such submission.

But a submission of the Husband as to any property which he cant dispose of or her lands or property to her sole & seperate use will not bind the wife.

The power of an arbitrator.

An arbitrator is bound by the terms of the submission & cannot exceede or materially vary from the Terms of it & this said if the parties agree that the award be written & sold it must be or it is void unless it is that when it was agreed by the parties that the award should be on guild paper & the arbitrators did not write it on guild paper it was holden that it was immaterial.

The arbitrators are under no restraint as to the examination of witnesses they may enquire of who they please even of the parties & are not bound to reject what would be inadmissable to enquire for facts according to the rules of law or according to the rules of Equity.

Who may be an arbitrator

It is generally true that any person of sound mind & discretion may be an arbitrator but Idiots. Lunaticks & other persons of non sane memory cannot be arbitrators neither can persons that are deaf or dumb for they are not capable of awarding.

So also persons who in Judgment of Law want understanding (tho they in fact have) as Infants feme covert &c cannot be arbitrators tho a feme sole may.

Slaves also cannot be arbitrators so also Attainted persons on account of their Infancy cannot be

It is now settled tho formerly questioned that interested persons may be Arbitrators if the parties are agreed to them & it has been determined in Com. that an interest in the arbitrator is no objection to the award provided the opposite party knew of its being interested 4 Mod 226. Hardres 43 no regard is now paid to relations.

What may be Submitted to arbitrators

Land it is said is not the subject matter of an award, But nothing more is meant by this than that upon it cant always carry into effect the award.

But the reason is because a certain mode of conveyance is necessary. But a promise to submit the title to Land is so far binding that if the one who is to convey by the award will not he is liable on his obligation to submit in damages tho. a Parol contract or submission in such case would be void by the Statute it being a Promise concerning & interest in Lands 6 Co 43. Cro Jac 99.

And in Con as lands may be created to commence in future an "award" to vest a title to land may be as effectual as to personal Property the Practice being here for the Parties to execute quit claim Deeds to each other & deliver them to the arbitrators as escrows to award for who they please they may therefore burn one & deliver the other to the one to whom they award & the title will vest in him

But in Eng the Practice would be nugatory as land then must vest instanter or not at all 1 Sch[?] 115.

So also an Award cannot be plead in bar to a specialty in Eng. if the party should sue as a specialty contrary to an award he would be liable to the other on his promise express or implied in the submissions

Public offences are not arbitrable because the law requires their punishment Matrimonial causes as divorces are not arbitrable because (Marriages ought to be free

But the civil injury accompanying the public offences & also the liability arising from contracts to marry or marriage settlement agreements are arbitrable

Questions of Yeomanry Illegitimacy Gentility &c are said in the Eng. Books not to be arbitrable But Reeve supposes that Arbitrators are competent to determine questions of property arising upon the legitimacy or illegitimacy of one.

Umpirage

When Arbitrators cannot agree in making their award it is frequently the case to call a 3 person to decide the question & make an award this third person is called an umpire & thus the whole differ. rests on him.

For the Boston Cultivator.

Dream.

In some times the practice for the parties to name the umpire in the submission & to leave it to the arbitrators to call him in if they cant agree — But the most com way is to submit it the arbitrators in case they cant agree shall choose the umpire.

In such case the arbitrators must exercise their discretion in choosing the umpire for if they choose by any chance as casting lots the award will be void & will be set aside 2 Vern 485.

The arbitrators have no power to choose an umpire unless it is submitted to them by the parties

It has frequently been made a question whether the umpire unless it is submitted to them by the parties could act within the time limited for the arbitrators to act: as where the parties submitted to A.B. to decide by the first of may & if they did not then to call in C. who is to decide by the first of June so also there was a submission of this kind to A & B. to decide by the first of June & if they did not decide by them C. was to be called in by the arbitrators to decide on the said first day of June here it was contended that the award of the umpire was nugatory as he could not act within the time limited for the arbitrators But it is now settled that in both cases that if the arbitrators will throw up their authority the umpire may act within the time limited for them to act & his award will be good if it have all other requisites 2 Vern 100. 1 Sid 428. 1 Ray 1 Ld Ray. 676. Cro Ca 263. 1 Sal 71. 2 T. R. 645. 2 but 113. 1 Sid 1 Mod 2

It was formerly holden that if the Plff in such case must alledge in his declaration that the arbitrators threw up their authority But this now settled that it is sufficient that the Plff aledge that the arbitrators did not make an award for it is to be presumed until the Deft shew to the contrary that the arbitrators had thrown up their authority (see the last authorities)

It was formerly made a question when the power of choosing an umpire was submitted to the arbitrators whether if the umpire did not make an award the arbitrators could choose another.

But it is now settled that they have not effectually executed their authority until they have made an effectual appointment which is not until they have appointed an umpire that will make an award (as authorities above)

The Duty of an Arbitrators

When parties submit to arbitrators without limiting the time for them to act if they act & make an award in a reasonable time either party after requesting them to do it & they neglect may revoke it & will not by such revocation make himself liable in an action to the other for such revocation.

If an arbitrator once accepts of his appointment he is obliged to act & unless the time is set in the submission for the parties to appear before them they must notify them to appear on some day within the time limited for them to act — this notice (which is usually in writing) must be a reasonable one so that both parties can conveniently attend or the award will not be good unless they both do attend

It is the duty of the arbitrators after the parties appear to proceed to the examinations

They cannot proceede to examine any witnesses until they are sworn which oath must be administered by some Justice of the Peace But unless they are restrained in the submission they may examine interested persons & may compel them & even the parties to testify If you refuse what ever the other will testify to will be taken Tho confession by the other if any of the witnesses so summoned & will not appear & testify they may be committed to Trial.

But persons cannot be compelled to testify to any thing that will endanger them to a legal punishment —

But it is usual to restrain Arbitrators wh to respect to their power of Examining Witnesses.

Arbitrators may adjourn from time to time Provided they adjourn to a day within the time limited for them to act for no award made after that time will be good unless by the express agreement of the parties; If the parties do not know to

what time the arbitrators was adjourned notice must be given or the award will not be good unless both parties are present

It is now settled if one of the parties do not appear it does not amount to a revocation nor will a revocation ever be implied but must be by express words but if a party has had reasonable notice & will not appear the Arbitrators may proceed exparte.

When a Power is given to a set of men as to A B & C. jointly it must be executed by all except in the case of Executors or the Exception will have no effect & a majority of that set of men will not bind — therefore unless it is expressed in the submission that a majority shall bind the parties all must agree to the award. But if one of the Arbitrators have notice & do not appear the others may proceed & make their Award Brown Notes 57.

In Com all the Arbitrators must be notified as they can be present but of the majority govern

If the Arbitrators do not make their award when the parties are present they must give notice to the parties when they will give their award unless the parties know of the time tho it is holden by some that when the parties are bound in a Bond they must take notice & no notice need be given by the Arbitrators but there can be no difference in principle between their being bound by a Bond or by a Parol Promise 8 Co 93.

When it was mentioned in the submission that the Arbitrators should deliver the award on a certain day it was made a question whether the Award must be in writing to make it the object of a delivery

So when it was mentioned in the submission that the award should be made ready to be delivered but in both cases it was decided that a verbal award was good If the parties intended that the award should be in writing they should have so expressed it & no award shall be invalidated by implication 6 Co 103. Co Litt 885. 1 Mod 160.

Arbitrators Power of Reformation.

Arbitrators can reserve no power to do a judicial act subsequent to the period limited for that award therefore

an award that A. should pay D13. 20 Dollars by a certain day but of more appeared due them to pay more was holden id not only because no such subsequent authority can be erred but also because an award to be valid must be inal Selw 110. 146. Cro Jac 315.

But they may refuse an authority to do a subsequent ministerial act for the award notwithstanding the act to be done may be certain, absolute & final as when the award was that A should pay 20£ per annum for a certain lot of land (the number of acres being unknown) on the quantity being over laid so an award that one shall pay the costs of a certain suit on their being ascertained is good for the act of ~~ascertaining~~ legal costs is merely ministerial 1 Hards 43.

Their Power of Delegation

Arbitrators can delegate no Judicial authority nor can they rest their award upon the opinion of any other person which award would be void so also an award that one of the parties shall pay a sum certain but that he give such security for the payment thereof as the parties shall agree upon not only becaus it is a delegation of their power to the parties but becaus the award is not final Cro E. 432.

But they may award the substance of the satisfaction & may delegate a power to a person delivering the form in which that satisfaction shall be made as when the award was that a release of rent should be made & that A. a third person should describe the form of the release — so an award of costs which have risen in a dispute they may delegate the proper person to express & assign them costs 2 Atk. 519. Str 787. Com 33.

It is now settled tho formerly disputed that the Arbitrators may award on the day of the submission Litch 14. It is also settled that the award may be on any hour of the last day limited in the submission for the making of the award Cro E. 676.

The Requisites essential to an award

It is essential to an award that it does not extend beyond the submission but to a stranger but that it embraces all

that a part only of the dispute submitted & that it be both phy-
-sically & morally possible. That it be reasonable that it be
advantageous to both parties. That be certain & that it be final

1st. It must not extend beyond the submissions which
means that the award must not extend to any disputes of the
parties not included in the submission for if it do the excess
is always void & some times the excess makes the whole void
2 Mod 309.

It has been supposed that an award concerning
collateral property in satisfaction of any injury falls within
the rule but tho it may seem dangerous to allow them
to award undisputed collateral property in satisfaction
But Reeve thinks the Arbitrators by the decisions are
fully established in this power as when an award
was that A. pay B. 3 Bowls of punch but the comment
lay down a different position 2 Ld. Ray 1089. Sidr.

This not an extention of the award beyond the
submission if the arbitrators direct the parties as to the
time & place of payment of the satisfaction awarded as
in genl submissions they may be awarded mutual of
all dues whatsoever.

Arbitrators have the power to dissolve
Partnerships on a submission of all controversies by the
Partners 1 Ridgl Blac 45.

It was formerly holden that an award of
mutual releases up to the award was void because it
includes disputes which may come after the submission
but this now settled that such award is good to the day
of the submissions & to that time only.

It is now holden tho formerly otherwise
that costs may be awarded by the arbitrators (they
being necessary appendages to the submissions) unless
there be a special contrary provision Cro Jac 577. 10
Mod 201. 2 Term Rep 124.

2. It was formerly holden that an award
might not extend to a stranger as an award that one
of the parties should convey property to the wife of the
other 5 Co 77. 10 Co 131.

(53) Next it was holden that an award to a Stranger was valid provided it was a benefit to the party who had rec^d. the injury & in satisfaction of which it was made as when A. in satisfaction of beating B. was awarded to pay £.10 to a Cr. of B. 1 Ld. Ray 123.

But it is now holden that an award to a stranger is in all cases prima facie valid for it is presumed in such case to have been made for the benefit of the party injured & cannot be destroyed until the contrary is shown 1 Sal 74.

An award that an Act shall be done by a Stranger is always void as it respects the Stranger & frequently such award is void as to the parties as when the award was that A. shall bind himself to B. & that he should procure C. to be his security then the award as it respects C. is wholly nugatory but B. by accepting the sole security of A. can then render the remaining part of it valid but his refusal will render it void

3^d. If the award must embrace the whole Matter submitted or it is generally void.

But this rule must be taken with this qualification that the award may not be so extensive as the submissions & still may be good as when the submissions was of all controversies both respecting real & personal property & the parties had no controversy respecting real property the award respecting personal property is good

So when the submission was all trespasses & dues & nothing was said in the award of only one debt still such an award is good until it is shown that that there was other controversies submitted to them for it is to be presumed in such case that there was not 8 Co 98.

But it now appears from the award that there was a dispute submitted to them that they would not award it is void Cro. E. 858

It is usual in all submissions to insert

a clause of ita quad (as it is called) it the parties agree to abide the award provided the arbitrators decide what is contained in the submission

When the submission is generally in of all controversies whatsoever the award is good if it extend to all controversies whatso as laid before them tho there is but one & whether the submissions contain the clause of ita quad or not 1 Hobl 49. 8 Co 98. Cro Jac 200. 355. 575 Cro Car 215. 1 Bur 274.

If the submission is a special one in one stating the particular controversies if it contain the clause of ita quad every controversy mentioned must be attended to by the arbitrators or the award is void 8 Co 98.

But it holden that such special submission contain no clause of ita quod the award will be good tho the arbitrators decide only with respect to one of the several controversies

But this distinction Reeve says is not well founded 8 Co. 98. 2 Ven. 100. or 110. 1 Bur dict 316. contra!

But if such an award is good it cannot be a bar to any controversy except the one awarded

So when the controversies submitted were with several or with A. B & C. the same rules apply & where the submissions is general & the controversies of A. is laid before the arbitrators they may decide that only but will be good so when the submission does not contain the clause of ita quod 1 Ven 259. Com 547.

4th: The award must be legal in it must not be in law or unlawful but this must not be construed to mean cases when the awarded was such merely as the law will not enforce as when one called another a liar & submitted to arbitrators who decided that he should compensate for the injury by awarding a sum of money paid In this case it was contended that the award was void because the arbitrators gave damages in law but tho the law will not redress such an injury yet it is not illegal

for one to redress such an injury / award was held good
1 Sid 12. 2 Lev. 245.

5. The award must be possible to be performed to be good, but this does not extend to cases impossible owing to the particular circumstances of the party for an award to pay £200. may be good "don't you see God answ" he is worth nothing but the impossibility must be be Physical or moral one.

If the impossibility arose from the party's own fault still an award will not be good unless there is an alternative in which the award is to do the impossibility or some thing else which he can do & then it will be good

So also an award that A deliver to B. a bond which is in the hands of C. is void because this matter impossible - but if the award had been to deliver up the Bond or pay the contents or a sum of money it would be good

But an award that A. should deliver to B. something in the hands of C. that he could compel C. to deliver either by a process in a Court of Law or Equity is good without an alternative as where an award that A should convey a title to land which B. held in trust for him for A. can compell B. to execute the deed in Cha. (in contracts)

6th. An award must be reasonable or rather it must not be unreasonable therefore it has been holden that an award that one party should serve the other he been held void because it was unreasonable so too an award that one party should marry the other has been held void as being unreasonable - so also it was formerly holden that an award that one should go onto the land of a third person to pay money was void it being unreasonable to compel one to make himself liable to an action of trespass - But this now holden good for the mere act of going on to another land would not make one a trespasser but if the owner of the land forbids coming on he will perform the award by tendering as nigh the place as he can go without trespassing.

It was also holden that when by mistake the award was to pay money on a day that was past that it was void but this now holden good & the payment must be made in a reasonable time

7th. An award must be advantageous to the parties therefore
an award that one should comb his head is idle & void.

It was formerly understood that it must appear from
the award that there was some thing advantageous awarded
to both parties therefore when a trespass was submitted
& the award was that the trespasser should pay 10 £ it was
holden not good because it did not appear that the
trespass was discharged.

But it is now holden that it is sufficient
that an advantage appear by connecting the award with
the submissions & in that case it is clear that the trespass in fact
was discharged.

So also it is now holden that an award that
the parties release each other of Trespasses without more is good.

8th. An award to be good must be certain
But if an award which appears unreasonable from the face of
it can be made certain by reference to something else may be
good (see the rules below)

An award that one is guilty of a Trespass
& that he pay for it without naming the sum is void for un-
certainty 2 Saunders 292. 5 Co 77.

So also an award that one give an other a
Bond for the quiet enjoyment of land is void for it does
not appear for what sum the Bond is to be given 5 Co 1
Co. E. 432. 7. 1 Ld. Ray 234.

So an award to pay as much as certain goods
were worth is void but K. supposes that if the price can
be known by any standard as by a Merchant it would
be good 2 Ld. Ray 1076. Also it is holden that an award to
pay the costs of a certain suit is good for this means the
legal costs which can be ascertained by a fee Bill Cro
Car 383. 1 Ld. Ray 234.

This no objection to an award on the
ground of uncertainty that one is to do an act or
pay a sum in penalty on the happening of some contingency.

Neither is it an objection to an award
that the time when or the place where the payment is to
be made is not mentioned in the award but now an demand

shall that it be paid to the person of the other.

This uncertainty if you make proper averments may after be helped but if it does not appear certain from the averments on the face of the declaration it will be ill for in all cases when you can make the award certain by referring to some thing else it will be good if you make proper averments as where an award was that one should pay for wheat as much as B. S. sold his for at a certain time so when an action of trespass was submitted & the arbitrators awarded the Deft to pay 10 £ & the Plaintiff averd counting on the submissions that the award was made an end concerning the promises in the submissions & it was held good Cro Car 283. 1 Sid Ray 112. 2 Saund 292. 1 Sid Ray 240 Hobt 49.

2dly. The award must be final in it must put an end to the original cause or dispute — But the rule must not be understood that this award will settle the controversy so that no actions will lie for the non award may lay the foundation for an action as when a horse or other property in the course of conduction & it is awarded to one of the parties this award is final as it settles the claim to the horse tho he may bring trover vs the other if he retains him counting on the award

So where a sum of money is awarded or a collateral act to be done tho this is final & conclusive as to the controversy yet it establishes the right to the recovery as to have the act done & you can recover the money so far the nonperformance of the act but no actions is brot on the award & you can never again go into the original controversy.

An award that one of the parties shall be nonsuited in a Cause is void because its not final for a non suit does not forever bar the parties from commencing his action again but an award that the Plaintiff should enter a retraxit is good for this is final But in Law a retraxit is considered the same as nonsuit therefore not final

Hoon

It was formerly made a question whether an award that all suits shall cease was good but it is now settled that such award is final & good for courts have construed it to mean that they shall cease forever 6 Mod 33. 2 Ld. Ray 961. 964. Stra 903. 1 Ld Ray 612.

10th. It was formerly said that an award must be mutual & mutually beneficial. — But if an award have all the afore mentioned qualities it will of course be mutual Com 328.

An award that the parties execute mutual releases up to the date of the award is performed by executing them to the date of the submission 10 Mod 201. 6 Mod 33. 2 Ld Ray 964.

When an award is void in part only & when in the whole

There are cases when an award may be void in part which will in some cases make it bad only as to the part & sometimes as to the whole.

When it is awarded that A. do some thing which the arbitrators have power to enforce & also something which they cant award him to do as that an award that he pay to B. £ 20. (which can award) & also that he give a Bond with security for £ 20. more (which cant award) If in this case will accept of that part which the arbitrators had a right to order in satisfaction of the award he may compell A. to perform it but cant compell him to do the other

But if B. will not accept of this part he may avoid the whole for he is not obliged to accept that pa without the whole Cro E. 432. 2 Lev 6.

So also when the award was to convey to a Stranger & also to B. here the award is bad as it respects the Stranger (unless to convey to the Stranger is beneficial to B.) but if B. will accept the conveyance to himself he may compel A. to do it 2 Lid 3.

But when the non performance of that which the arbitrators had no right to award, will break up the mutuality of the award it will be void in toto as where it was awarded that A should pay 20 £ & he should enter into a Bond with security for the 20 £ & that B should deliver up certain property here as A is not

obligged to fulfill his part of the award B shall not be Cro. Eliz 577. 2 Saund 293.

When the Arbitrators make a special award when there are several controversies as for distress 20£ & for debt 20£. & also award £ 20. for some thing that was not submitted as for a Horse still the award may be good as to what was submitted for in this case the bad part may be severed but if they had award generally an aggregate sums for the whole the whole award will be bad for the bad part cant be served.

In all cases where the award is that one do some thing which the arbitrators cannot award yet if he will do it he may compel the other to perform his part of the award as when it was awarded that A & his heirs (a stranger to the submission) should convey land to B. & that B. should pay £100. If A will get his Son or heir to join with him in a conveyance to B. B. will be obligged to pay the 100 £ There are cases when one part of the award is bad & still the other will be compelled to do his part & in all cases the non performance of the bad part will be as beneficial to the other as tho. it was performed for this does not not break up the mutuality between them as where an award is that A. pay 10£ for a trespass & that B. execute a Release of all trespasses up to the date of the submission which was formerly void & could not be compelled to execute it but still A would be obligged to pay the 10 £ for the very payment of this is now considered a release tho might not be considered of quite so good evidence as a written release.

Form of an Award

Unless the submission contain words that amount to an express provision that the award shall be in writing it is now holden that the award may be by parol whether the submission be by writing or not as when it was provided that the award should be ready to be delivered on a certain day it was holden that a verbal award was good 1 Sid [illegible]

But the Arbitrators must always abide by the provisions of the parties contained in their submission unless they are Idle & nugatory & in such case the Arbitrators may reject them tho. the award contain the clause of the Ita quod as when the provision was that the award should be on quill paper. So R. says that a provision that an award should be sealed is nugatory & may be rejected in Con Brown Noti 56.

But when it was provided that a verbal award should be given in before 2 witnesses it was holden that the award to be good must be given in before two witnesses Palm 119. 121.

And they must always abide by the provision when it will be of any the slightest use to any party

It was formerly holden that when the submission contained the clause of ita quod (that they) or a provision should be of end concerning the provision that it must be mentioned in the award that it was of end concerning the provisions contained in the submission*

Performance

Formerly the law was so riged that nothing was considered a performance but a literal performance of the award But in many cases it is impossible to perform an award literally it is therefore now settled that a substantial performance is sufficient as when it was awarded that one who had wrongfully obtain=ed letters testementary should deliver up the will to the right full Executor But he could not do more than to deliver up the letters Testamentary containing a copy of the will for he had not proven the will it being in the hands of the Judge of Probate the delivery of the letter was held a sufficient performance so when the award was that one should execute a release up to the date of the award, it was holden sufficient to execute one up to the date of the submission 6 Mod 34.

If one cannot literally perform an award

still if he can do it substantially he must do it without the request of the other.

When you can avail yourself of an award without the concurrent act of the other as when it is to pay money or some collateral thing as the delivery of a deed you may always invest yourself by a tender & when you are ordered to do some thing which requires the concurrent act of the other party as to make a feofment which was by delivering a turf or twig which to make it a feoffment must be accepted by the other party [illegible] you must offer to do it & be ready or if the party is there you must offer to do it & it shall give you all the benefit of a tender or performance 1 Ray 233.

When there are mutual acts to be done by both parties & the act to be done by one is to be done precedent to that of the other he must perform his before he can compel the other to perform his part in an action but on the award he must aver & prove a performance or that he offered to perform on his part as when it was that A. pay B. 10£ & on his paying such sum B. shall give him a Release there the payment of the money is a condition precedent to the giving the release But when it was that A pay B. ten pounds & that B. release A. of a trespass neither of the acts are to be first performed therefore each must be performed before the can compel the other to do his parts 1 Ray 169.

When it is awarded that one shall do an act & the other agrees that he may do some thing else instead of performing it literally he may do it & it will be a good performance as when an award was that A. convey land to B. & B. or B has or wishes to convey that land to C. & C. wishes to take a conveyance from A. & B. agrees to it it will be a performance to convey to C. If no time is mentioned in the award for the performance of it it must be performed in a reasonable time which is

question of fact to be left to the tryers to determine what is & what is not.

It has formerly been a question whether if after a right of action is once attached by the other not performing in a reasonable time or at the time set whether it can at any time before suit tender the sum due on the award with the suit but it is clear that a tender would be good in such case tho' con after suit brot on the award.

Breach of an Award

When one violates or neglects to perform his award an action lies on the award in favor of the other to recover damages for its non performance

It was formerly made a question whether if it be awarded that all suits shall cease between A & B. it made a breach of the award to frame a suit vs. B & C. but it is plain it will not ... 2 d 204.

It was formerly a difficulty for courts to get along with an award where A & B submitted all controversies to Arbitrators whilst the Court was sitting & it was awarded that all suits should cease between them A. having one then pending in Court he notwithstanding took a Judgment which of course would appear to be rendered before the sitting of the arbitrators as all Judgments bear date from the first day of the Term tho it in fact was pending in Court at the time of the award the question was whether A. had made a breach of the award but they would now determine it a breach of the award.

Where the award is that A. shall lease land to B. rendering 10 £s rent per annum the award is performed on the part of A. by leasing the land & on the part of B. it is performed by his accepting it but the non payment of the rent is no breach of the award any more than the nonpayment of a Bond which was awarded to be

(65)
given but his remedy to recover the rent is like any other case (viz) in an action on the Covenant contained in the lease 2 Stra 903. 1082.

Action & Pleading for a breach of an Award

The remedies on an award are different according to the different modes of submitting.

When the submission is in parol or in writing without any express promises & a sum of money is awarded you may bring Ind. ast. on the award & also if your submission by parol or in writing without any express promise to abide & a collateral act is awarded to be done your action on the award is Ind. ast. on the implied promise to abide the award you must state the submissions that is the substance of it tho, you need not write it verbatim as that A. B. & C. were nominated & appointed by the parties as arbitrators & that the parties agreed to submit (naming the controversy) to them to decide according to their discretion or according to law or according to Justice & Equity as the case may be stating every thing material in the submission tho, you need not state any thing that is not material as that the award should be on gilt paper 2 Stra 923.

You must also state the award in the substance of it & that the arbitrators decided on the premises in what was contained in the submission 1 Saund 33. — If a request of the Deft to perform was necessary to give the Plff a right of action he must state one so also if the Plff is to do some act as a condition precedent as when the part that the Plff is to do was void so that unless he performed it the Deft is not obliged to perform his part (because it would break up the mutuality) the Plff must aver a performance

You must also alledge a breach of the award by the Deft but you need not assign a breach only in the good part & if you alledge a breach in a void part you hazard your declaration for if damages are assessed on the award an aggregate sum is both the good & bad part the Judgt will be arrested.

When the submission is by Parol this is the only way of proceeding but it is usual in Eng. to enter into a submission by giving Bonds conditioned to abide by the submissions & in Con. the usual practice is for each party to execute a Note to the other which are delivered to the arbitrators as escrows conditioned that the arbitrators shall endorse them as they think right the condition appears on the Notes & the rule of pleading is the same in both cases.

When there is an Award & a breach of it in such case the Bond is forfeited & the other may either sue on the Note or Bond or may sue on the Award which does not form an exception to the rule that you must always pursue your highest remedy for the bond or note is not for the same thing but only a collateral security to perform the Award 293.

The most usual way when Notes are given is for the arbitrators to deliver up the one ps. him who will not perform the Award & for him to commence a suit on it. — When Bonds are given (which remain in the hands of the parties) it is usual to sue on the penal part of the Bond without mention of the condition or Award. The Defl may then crave oyer of the conditions & place it on record & may plead no award But a replication of the Plff in such case that there is an award is not good — But the Plff in his replication must set out the award in the words & figures of it & must also assign a breach of the award in his replication the award then becomes a part of the declaration if it is not a legal or sufficient award as if it does not tally with the submissions the Defl may Demur to the replication for Thus the Award & submission appear of record but if the replication is not true the Defl may rejoin over his old plea that there was no such Award made to a plea of no award in the rejoinder means no award in fact is no such award as the Plff has alledged in his replication which is an issue of fact to be tried by a Jury.

The Plff in his replication must set forth every thing necessary to entitle him to recover so that it will tally with the submissions as that it was made within the time limited by the submission &c or his plea is bad on demurrer Cro Jac 278. 2. Mod 77. Hard 399. Show 98. Carth 158.

It was anciently holden that if the Plff must not only alledge a breach but he must also aver that he has performed his part of the award but this rule will hold good now only in two sett of cases viz where the performance of the Plff part is a condition precedent to the performance of the Defts part or when the act which the Plff is to do is void he must perform it before the Deft is obliged to perform his for the award unless the Plff will perform his part is void as it breaks up the mutuality the Plff must therefore in such case aver a performance in his replication & these are the only cases when such averments is necessary Hards 43. – 4.

A tender or offer to perform an award & a refusal & neglect to accept by the other is as beneficial as payment or averment therefor of such refusal is as beneficial as actual payment (See title tender) Hard 43. 44.

The Plff is not obliged to state the award verbatim but he may only state the substance of it ie according to its legal opperation but the Deft if he wish to have it appear on record as it is he may crave oyer of it & thus he may demur to it but he may without rejoin his old plea no award & in such case unless the award tally with the declaration the verdict must be for the Deft no award 1 Ld. Ray 715. 11 Mo 278.

When the action is brot on the award the Plff must set forth in his declaration necessary to entitle him to recover viz that the parties submitted &c 13 H 6. or that they made

this award &c & to this declaration the defendant may plead that he never submitted which he could do to the action on the Penal Bond for it does not appear from the declaration what the Bond was given for until oyer prayed & then it opens from the condition that he actually did submit which he cant contradict but still it may be he did not submit for the bond may be forged or it may be the parties after executed this bond agreed to throw the matter up & in such case the Deft may plead the gen'l issue non est factum & give the fraud in evidence

When there is an umpire the Deft must aver in his plea that neither the arbitrators nor the umpire have made any award for as it is expressed by the Lawyers every plaster must be large enough to cover the sore &c unless the defendant can answer the allegations of the Plaintiff in every material point they shall stand as confessed & will be implied in the Deft

It must always appear from the allegations of the Plff or from the finding of the Jury that the award was never performed or the Plaintiff cant have Judgt

Therefore suppose the Plaintiff & the Deft plea of no award replies that there is an award & they issue on that fact Judgment cant be rendered for the Plaintiff Provided the Jury find an award for the issue is immaterial there appearing no breach of the award Yelv. 153.

But you never need assign a breach in a void part for this the defendant is not obliged to perform Lo. Ray 1114. 2 Mod 309.

When the award is in the alternative to do one of 2 things you must state the breach as to both parts of the alternative in that the Deft has done neither unless one is a void part

Tis a rec'd opinion among Lawyers that the assignment of more than one breach of the condition of a penal Bond is bad. Therefore according to this opinion when several things are

awarded to be done you cant assign as a breach the non performance of either one — the reason is said to be this that by that breach the whole Bond is forfeited This reason says R. would be good why the Plff need not assign more but his assigning more ought not to be considered as a fault but there are cases in most reports where more than one breach has been assigned the above plea cant now be law [illegible]

But in an action on a covenant you may assign as many breaches as there are for you can [illegible] for only those that you do assign & by Statute in Con you may assign as many breaches as you please in an action on a penal Bond.

When the Deft prays oyer of the Condition & places it on record he may instead of pleading no award plead some collateral matter in bar to it or release tender &c & in such case the Plff must not set out any award or breach for the Deft by his plea in bar has admitted it must either demur or traverse the plea in bar — But the Deft after he has plead no award & the Plff has set out the award & a breach of it cannot plead performance for this contradicts his former plea of no award & is therefore a departure from it.

It may happen in some cases that the award after it is set out or made may appear good & appear to tally with the submission & still it may be bad: as where several distinct controversies submitted & the arbitrators award about only two when more were laid before them the award is bad only from the fact of their not awarding of all that was laid before them — in this case the Deft must not demur because the word appears [illegible] neither can he traverse the replications for that is all true but he must rejoin no award of the premises i.e. that other controversies contained in the premises or submissions were laid before the Arbitrators about [illegible] he made no award &c Chas Roo. [illegible]
[illegible]

If the same cause the [illegible] for [illegible] [illegible] [illegible] [illegible] to contest the validity of the [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] of the [illegible] [illegible] [illegible] [illegible] [illegible] to set the award out [illegible] [illegible] [illegible] [illegible] other [illegible]. The Plaintiff [illegible] [illegible] [illegible] [illegible] to contest the validity of the [illegible] [illegible] to the Defts plea as if he means to deny the averments of the Defts he may [illegible] 8 Co. L. 305.

When the Deft [illegible] [illegible] [illegible] [illegible] the performance of the award he may [illegible] [illegible] [illegible] [illegible] [illegible] performance which [illegible] the Plff [illegible] [illegible] of setting out the award [illegible] [illegible] [illegible] [illegible]

[illegible] [illegible] [illegible] that the Defendant [illegible] plead performance in the words of the award [illegible] that he has performed (naming the act as [illegible]) [illegible] which was awarded as [illegible] from the award in Co. but when the award is the performance is [illegible] act about which a question of [illegible] [illegible] arise whether it was performed legally he must shew how he performed it (as a [illegible] [illegible] [illegible] awarded) so that the Court [illegible] [illegible] [illegible] he executed according to the rules of [illegible] [illegible] he executed it in writing [illegible] [illegible] [illegible] [illegible] (The Deft need not aver a performance of a part of an award which [illegible] [illegible] to perform. [illegible] [illegible] [illegible] [illegible] plea as performance to when the Plff [illegible] do some thing which is a condition precedent to the performance by the Deft, the Deft [illegible] aver that the Plff was to do [illegible] [illegible] before the [illegible] [illegible] [illegible] [illegible] [illegible] that he [illegible] [illegible] performed it

When an Action is [illegible] [illegible] [illegible] [illegible] Debt [illegible] [illegible] [illegible] [illegible] pleads [illegible] [illegible] the Plff may [illegible] that the Deft [illegible] [illegible] [illegible] which [illegible] is a [illegible] [illegible] 135 8 Co. L. [illegible]

[illegible] [illegible] [illegible]

power the arbitrators [illegible] act within the time limited by the submission to give the arbitrators a further power to act by another time limited the, the parties would be bound by the award in such case yet they would [illegible] on the Bond (the [illegible] [illegible] has been otherwise) the condition of which is that the arbitrators shall award by the first time limited [illegible] [illegible] bond would be therefore [illegible] [illegible] in such case. [illegible] T. R. 792.

Power of Chancery [illegible] [illegible]

Where the parties submit to arbitration by rule of Court [illegible] Court of Chan. [illegible] [illegible] not [illegible] [illegible] to be done there, will on petition decree a specific performance of the award. [illegible] [illegible]

But where the submission is not by rule of a Court of Chancery will not decree a specific performance as when it was awarded that one of the parties should pay money that the other should [illegible] [illegible] to certain lands. It was holden in Chan. that the acceptance of the money amounted to an acquiescence [illegible] [illegible] [illegible] to convey the land they therefore decreed a specific performance of the award. [illegible] 2 [illegible] 119.

Where there is an award that the parties have for some time acquiesced in & have acted according to what is awarded if there is [illegible] [illegible] wanting to make it a good award tho' either of the parties may break up the award after such length of time in a court of law yet Chancery [illegible] on petition by the other lay an injunction on him to proceed no further [illegible] Courts of law. [illegible]

Eng. will never break up an award for [illegible] corruption or misconduct of the arbitrators [illegible] Courts of Chancery in Eng. & Courts of [illegible] [illegible] will set aside an award when the arbitrators have been guilty of misconduct [illegible] [illegible] [illegible]

[illegible] 315. 2 [illegible] 129. [illegible] 599. [illegible] 515.

[illegible] 101. 251. 2 [illegible] [illegible] [illegible] 265. 18. [illegible]

[illegible] voluntary payment of the [illegible] by one of the parties with Chancery in Eng. sufficient to set aside an Award and [illegible] [illegible] the Arbitrators to alter their Award but [illegible] [illegible] & it is allowed [illegible] the practice for one of the parties to pay their fees before the Award is [illegible].

So where Arbitrators [illegible] appointed to award between 2 men one of [illegible] [illegible] [illegible] to the arbitrators & the award [illegible] his favour [illegible] [illegible] [illegible] [illegible] to him they [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] Chan. [illegible] that they were dangerous [illegible] [illegible] set the award aside 2 [illegible] 151.

So where there were some [illegible] [illegible] [illegible] to the Arbitrators [illegible] they [illegible] [illegible] the Arbitrators [illegible] have [illegible] a different Award Chan. will set it aside [illegible] [illegible] probably [illegible] all these cases [illegible] [illegible] [illegible] sufficient to set aside an Award in a Court of [illegible] Com. but [illegible] in a Court of Chancery.

So where an Award is [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] the Award will be set aside in Chancery an Award that a guardian [illegible] [illegible] [illegible] [illegible] word convey [illegible] — when an Award is set aside for misconduct in the Arbitrator Chan. will [illegible] order costs to be paid by the person [illegible] [illegible] the Award is of [illegible] [illegible] [illegible] for he is in no wise [illegible] [illegible] [illegible] [illegible] [illegible] practice [illegible] [illegible] cases [illegible] [illegible] [illegible] [illegible] Arbitrators by [illegible] them with the parties to these causes [illegible] [illegible] ought not to be set aside for misconduct or corruption & their costs [illegible] be [illegible] [illegible] [illegible].

When an Award is by rule of Court [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] the award is [illegible] [illegible] [illegible] Chan. [illegible] [illegible] [illegible] may [illegible] [illegible] the party for a contempt for [illegible] [illegible] [illegible] [illegible] Award [illegible] [illegible] of the [illegible] [illegible]

[illegible] yet it [illegible] [illegible] But [illegible] the parties in whom the [illegible] case may enter in [illegible] in the Courts of Law as their accepting [illegible] they [illegible] may accept the award or not upon the submission [illegible] by rule of Court but when the submission is not by rule of Court in Law the parties [illegible] upon other causes for setting aside the award in Courts of Law [illegible] proceeding in [illegible] award.

So also Chan. will not [illegible] awards for causes [illegible] would be sufficient to set aside the award [illegible] Court of Law [illegible] the time limited for setting aside an award in a Court of Law [illegible]. So also where the Judges of a Court of Law were divided, so that no decision could be had as the [illegible] had [illegible] no [illegible] allowing a casting vote [illegible] set the award aside for the same causes [illegible] Courts of Law & Chan. will [illegible] the merits of the original cause submitted to [illegible] whether the Arbitrators have done [illegible] or not, still an award may be set aside for intrinsic causes when they appear on the face of the award as where the Arbitrators made a mistake about their own principles [illegible] of Computation.

It is now settled that where there is a good award made it shall bar an action [illegible] for the same original cause submitted.

It was formerly holden that if the award gave a new remedy as where something was awarded to be done by one party that an action would lie on the original cause of action. But it was always holden that if one after the award [illegible] on the original cause of action he would make [illegible] self liable on the [illegible] (on his award).

But it is now holden that an award [illegible] will bar any action for the original controversy submitted [illegible].

It was formerly holden that when

the time for performing the award was elapsed upon [illegible] your original cause of action but this is now settled in Com Law Eng. [illegible] award [illegible] for the breach of the award — the [illegible] is said to be that formerly the deft. would plead performance of the award in bar [illegible] an award had been made

When one submits a controversy & before the award is made sues on the original controversy the Deft may plead the fact of submission & it will be a good defence vs that action tho it will not be a total bar to the right of action for an award may be made.

An award may some times be plead in bar to an action not by a stranger to the award for no man can [illegible] but one satisfaction for a demand as when A & B. commit a trespass jointly & A. submit to arbitration so when the owner of Cattle submit a trespass done by them while in the possession of an agister there shall be the right of action vs the agister Com Rep 328.

Foreign Attachment

Foreign attachment is a process enacted by Statute for the purpose of compelling the Dr. of your Dr. when your D. Cr. is absent or absconded so that you cant get at him to pay to pay the debt due to your D. C. over to you & such payment under the process by the garnister (or Trustee as it is called) is good accounting to his Cr. & may be plead in bar to an action of Assumpsit brot for such debt & also to many other actions as he is obliged by law to pay it. such process is not known in Eng. except by custom of London nor in many of the [illegible]

This foreign Attachment issues vs the original Dr. to attach the property in the hands of Garnisher the Sheriff is commanded to leave a copy of the same in the hands of the garnisher or agent or Trustee to the original Dr. & such service will secure to the Plff all the property or effects in the hands of the Garnister [illegible]

[illegible]

[illegible]

ing the Deft after [illegible] proof is read that he would be obliged to [illegible] to the Plff if He recover Judgt in the [illegible] of the Judgt provided [illegible] property in his Hands to that Amount

The Court will never [illegible] [illegible] as the Deft [illegible] the Deft [illegible] reasonable notice so that the Court can presume that he had notice of the suit

The garnishee is also allowed (in case the Deft does not appear) to appear & defend the suit & shew that he has no effects or is not a Dr. to the principal But if neither the Deft or Garnishee appear to Defend the suit & a reasonable time is elapsed for the Deft to appear the Court will render Judgt by Default & Execution will issue vs the goods or effects of the Deft in the hands of the garnishee but unless the Plff pray out his Execution within [illegible] after Judgment he Looses his Lien on the Property in the Hands of the Garnishee [illegible] by the Attachment

But if the Exon is prayed out within 60 days & delivered to an Officer who calls on the Garnishee it is the duty of the Garnishee to pay what He ows the principal & to turn out the property of the principal on the Exn. to the Amt of the Exn. & such payment will be as beneficial to the Garnishee as payment to the principal & if He should be afterwards sued for it by the principal he may plead the payment in bar so far as it goes.

This foreign attachment can never issue for a tort committed by the principal but only on a Contract

If the Garnr. does not in such case satisfy the Exn. Sire facias may issue vs him to shew cause if any he have why Exn. should not issue vs him & his own proper goods & estate.

The Grnee in such case is both deft & witness for by the Statute if He will testify that he has no effects of the principal in his hands & is not a Dr. to him unless the Plff can disprove clearly such testimony He shall recover Judgt & his costs in his plea is that He is not factor. Atty. Agent. or Trustee to the principal

now has he any effects in his hands which belong to the principal as the Plff in his declaration hath alledged

But if the Plff can prove from his testimony or any other that he has effects in his hands Judgt will be rendered vs him to the amount of such effects & that he pay costs & cannot compel the principal to account to him for the costs on such suit facias for it was his own folly that such suit was commenced

It has been a question by some whether the Garnr would be allowed to testify unless called upon by the Plff as a party Cha. it never allowed to testify unless ~~allowed to testify by~~ applyed to by the other party. but it is determined by the Supm Court that he may that this privilege is given him by Statute otherwise the Plff might prove him a Dr. to his principal when in fact he before satisfied the debt as the principal might not be there to acknowledge it.

This now settled (tho formerly questioned) that if the Garnished is compelled to pay the Money to the principal on an Exn during the process or him that it shall exonerate him for otherwise he might have his property attached & could get no relief but by audita quer

From this decision many were of opinion that on Exn debt could not be sued by this process but such opinions are erroneous such debt may be holden unless the Garnish is freed by the Officer holding the Exn.

It has been the opinion of some that the principal cannot sue the Garnished during the process of the foreign Attachment but this is erroneous for the Plff on the foreign attachment may not recover but such suit shall be stayd in Court until the decision is had on the foreign attachment.

This decision has opened a door for some fraud by the Garnished procuring (as notice of the suit) some person to commence a suit & continuing it in Court without any cause of action to prevent the Plff in the suit from obtaining Judgt.

It has been a question whether this

Judgt on the foreign Attachment is such a one as an Exn can issue from or the principal or whether it is only a part of the Procefs to lay the foundation for a scire facias vs the Garnishee. But it is now settled by the Supreme Court that such Judgts are good for nothing only for the purpose of laying a foundation for a scire facias vs the Garnishee Therefore to compell the principal to pay such debt in default of the Garnishee you must sue on the original cause of action & if the principal should plead that a Judgt had been obtained upon it you may shew what Judgt it was which shall not bar your right to recover.

From this decision it is settled that the Garnishee may plead in abatement to the foreign Attachment that he never was agent &c. Factor &c for if he is not the Judgt is good for nothing

The Plff in the foreign attachment cannot issue scire facias vs the Garnishee until the debt which he owes the principal has become due tho if the scire facias be commenced costs would continue it until the debt become due.

So when the debt due from the Garnishee to the principal is some collateral article as a note for 50 pr. shoes Courts have decided that he may turn out such shoes on the Exn & the Aff must take them & tell them at the post so where it is a note for 20 £ payable in shoes he shall not be compelled to let the shoes go for what they will sell at the post but will be entitled to the Com price for the Garnishee is never to be put in worse situation by paying the money to the Plff in Forgn Attachment Property left in the hands of the Garnishee for the purpose of paying over to some other person is not holden by the foreign attachment

Releases.

Some times when one has the right of action as that he will for a consideration release his former

such release when given for a valuable consideration may be plead in bar not only to the action of assumpsit but also to every supporable personal action which this release is a discharge from whether the action sounds in tort or cont It is true however that such release can never bar a real action for the title of land cant pass by it for lands are to be conveyed by a particular mode of conveyance only.

Such release without a consideration is no better without a consideration than any other Cont. but a written release in Cov. & a sealed one in Eng. without any consideration acknowledged imports a sufficient consideration so that the one who gave it can never contradict it by parol testimony.

But when the release is a simple contract that is a writing without seal in Eng. tho consideration expressed it will import none but the Deft must prove one or his release is good for nothing

When the consideration is disclosed on the face of the Release if it is good for nothing the release will be good for nothing. When if it has been expressed to have been for value rec. of the thing given as consideration not disclosed it would be good because you could not enquire into it so too if a bad consideration is good for nothing in Judgt of law is disclosed on a release that would otherwise import one Recon supposes that it would be good for nothing for this reason the presumption of their being such consideration as the release imports The words all demands in a release are the most extensive words that can be received in a release & as a genl rule it will extend to every kind of action that may or can arise from any cont. or act that is already made whether now due or to be performed in future as a contract to pay money at a future day which is called debitum in presenti solvendum in futuro Co. Lit. 291. Cro. Jac 300.

But to this rule there are some exceptions. If a Covt. is given & not broken the release of all demands will not discharge it unless the right grows by the Covt. as a Covt. not to commit waste but a Covt. to pay money rent or to do some act is discharged by such release (see Title covt.) Co Lit 92

So also annual rent growing out of Land cannot be discharged by such genl. release for such rent is payable only in consequence of enjoyment & is incident to the Land & passes with it but rent payable in gross is discharged by such genl words contained in a release Cro. E. 600. Cro. Jac. 487. Cro. E. 666. 1 Salk 578.

So when ones right of action depends on a contingency which may or may not happen & is out of the power of either party to make happens as when A. had executed a release to B. of all demands in settling the accounts & previous to this B. had given a bond to A for C's appearance in Court in a suit in favor of A. this bail Bond not being broken at the time the release was given was not discharged by the release but this rule cant be supposed to extend to debts payable on the happening of a contingency Cro. 170.

A promise made by a person to a feme sole in contemplation of marriage to pay money after the coverture is not discharged by such release & the reason is obvious the Husband cant release it for he has no possible right of action on it Cro Jac 229. Yelv. 156.

This release is some times not so extensive owing to the particular occasions of giving the release as when A. owd B. £ 5000 & as a token of respect to him gave him a legacy of 5£ & A. & B. both died & left C. & D. their Executors C. the Ex. of A. paid B. the 5£. & D. gave him a release in these words recd. of C. a legacy of £5. in full of all demands the Cort infers in this case that the release was meant to be restrained to that particular occasion & would not extend to the 5000 £s Carth 119. 3. Mod 277. 2 Lev. 215. Snow 150. 155. & from these decisions it may be laid down that if one can infer from the words contained in the release that it was meant to be restrained to that particul -

(74) 80

occasion it will extend to no other. And when you cant collect from the release the occasion of it. Reeve supposes that from analogy to other cases that you may prove a set of facts in proving which there is no danger of fraud or perjury to shew that the parties did not intend that the release should be so extensive as these words will warrant not that you can prove what the parties said as that it should extend only to such a case. But when A. holds a Note as assignee of B. vs C. & in settling his private accounts with C. witnesses were present & saw them cast up their accounts & this note was not mentioned – to prove these facts is not to prove any cont between the parties nor is there any danger of fraud or perjury in proving it [illegible]

A release of all covenants extends only to the specific thing called a cov! but it extends to covts as well before as after a breach Co Lit 191. 2. 2 Lev 206. the words all claims are said to be as extensive as all demands Co. Lit. 191. 2.

The words all suits actions controversies &c it is said will not extend either to annuities or to rent payable in gross Co C. 8?.

Illegality in a Contract

A contract to do an illegal act [illegible] is [illegible] [illegible]

[illegible]

[illegible]

Infancy

[illegible]

Merger

[illegible] a Contract [illegible]

To [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] in a writing, [illegible] [illegible] the [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] for [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] the writing in evidence.

But it has been decided in Eng. that when you have a writing, you must bring your action upon it.

But the [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] of [illegible] for in an action on Bond which is the same as [illegible] [illegible] such writings as notes are allowed to be given in evidence. [illegible] But when the new security [illegible] the old contract [illegible] the contract as this [illegible] as when a Note [illegible] [illegible] [illegible] [illegible] [illegible] of the old [illegible]

But the [illegible] [illegible] [illegible] Eng. [illegible] this effect must be [illegible] [illegible] [illegible]

But if the new security is void so that no action [illegible] lie upon it the old contract is not [illegible].

The principle on which the doctrine of [illegible] [illegible] is that of the [illegible] contract [illegible] the [illegible] and it must be [illegible] [illegible] [illegible] to an action on the Bond [illegible] [illegible] be proved to be the same but by [illegible] proof.

Where several bonds are given for the same [illegible] date the same time [illegible] payable at the same [illegible] the law will presume that they were all given [illegible] the same thing [illegible] [illegible] [illegible] only one [illegible] the contrary be [illegible].

Payment of a demand in [illegible] [illegible] not only to the action of [illegible] but to all actions [illegible] [illegible] [illegible]

It is now settled that payment may be [illegible] in evidence under the [illegible] [illegible] [illegible] [illegible] tho it is the most [illegible] practice to plead it specially in bar.

By Com Law a plea of payment to an action on a Bond would be established only by evidence of as high nature as the Bond itself. But a plea of tender may be established by the Com Law by [illegible] proof [illegible] [illegible] [illegible] Com [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

And at Com. Law when there was a condition [illegible] the performance of that condition might always have been proved by parol hence the rule that accord & satisfaction may in all cases be plead to a Bond [illegible] the liability on that Bond grows by the breach but not when it grows by the Bond itself.

And in Con. the maxim that a Cont. can be discharged only by evidence (or other contract) of a higher nature as the Cont. has been wholly disregarded & parol proof is admitted to prove payment in all cases.

Action of Debt.

Formerly the action of Debt was the only action to recover a sum certain of money by simple Contract & it will lie in all cases when a sum capable of being ascertained before suit is brot is due whether by Specialty or simple Contract.

Tho the action of debt on simple contract is now wholly given way to the Action of Ass.t which was formed from the Statute of Westm. 2d. it being a more beneficial action as the Wager of Law was allowed the Deft in an action of debt the [illegible] it was [illegible] in these times but the reason [illegible] is said to be [illegible] Common Law [illegible].

It was formerly holden that the Plff must recover the precise sum laid in the declaration or he could not recover [illegible] [illegible] found due to him tho not the one mentioned in his Decl.

Debt is the proper action to recover the penalty of a Stat. to which [illegible] Ass.t will not lie. The [illegible] an action is brot to recover a penalty called an action on the Statute.

The difference between a fine & a penalty is that a fine is payable to the public & a penalty is payable to some individual or a part to an individual & part to the public. The penalty is considered as a punishment yet the action brot to recover that penalty when broke by an individual is to all intents & purposes considered as a civil action [illegible] allowed the same evidence [illegible]

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[illegible] the [illegible] difference [illegible] [illegible] to [illegible] the Court of Law to [illegible] the [illegible] of the [illegible] [illegible] that a Court of Chancery [illegible] [illegible] to the [illegible] the [illegible] according to [illegible] [illegible].
Again this [illegible] [illegible] that [illegible] accident [illegible] are principally [illegible] in Chancery [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] bound by [illegible] [illegible] [illegible] 1 [illegible] 374 [illegible].
A. to the first [illegible] a [illegible] [illegible] [illegible] [illegible] of the [illegible] was [illegible] [illegible] by [illegible] of [illegible] [illegible] [illegible] [illegible] the Com. Law — spirit [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] the case [illegible] [illegible] the [illegible] [illegible] [illegible] [illegible] of [illegible] [illegible] of [illegible] [illegible] [illegible] [illegible] [illegible] perfectly clear that Eq. [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] 243 [illegible] [illegible] [illegible].
A. to the 2^d particular [illegible] [illegible] [illegible] [illegible] bound by [illegible] [illegible] accord[illegible] [illegible] [illegible] as a Court of Chancery is a maxim of the Com. Law the rules of construction are [illegible] the [illegible] [illegible] both Courts 3 [illegible] 375. 11 [illegible] [illegible] [illegible] [illegible] 241.
[illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] the cases [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible].
[illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] as [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] 85 [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible].
[illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] Court of Law [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] 3 [illegible] [illegible]

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[illegible] the Court of Law [illegible] case can only give damages for the non-performance of the agreement.

Upon these three [illegible] individually [illegible] the true Construction of Covenants [illegible] the effects of a trust rests the Jurisdiction of a Court of Chancery as contradistinguished from a Court of Law.

Their Power to enforce a Specific Execution

It is generally true that the decree of a Court of Chancery [illegible] a performance which is done by setting a penalty on the person which he will forfeit unless he abide by the decree. [illegible] effectual [illegible] they make them to [illegible] which operates [illegible] specifically [illegible] enjoy [illegible] operating [illegible] title.

[illegible] can be had in a Court of [illegible] Chancery [illegible] that specific execution of [illegible] Court of Law. [illegible] the Courts of Chancery [illegible] general rule [illegible] specific execution of a Contract [illegible] Chancery enforce such Contracts [illegible] must be [illegible] Court of Law [illegible]

[illegible]

damages in a Court of Law [illegible] performance [illegible]

[illegible]

[illegible]

[illegible] Chancery [illegible] Court [illegible]

[illegible] Equity [illegible]

Chancery [illegible]

[illegible] damages [illegible] Court [illegible]

[illegible] will not give damages [illegible]

[illegible]

[illegible] Chancery [illegible] Contract [illegible]

[illegible] 15 Ves. 515.

When a Cont. is [illegible]

[illegible] contract [illegible] Chancery [illegible]

[illegible] the [illegible] object the obligee by [illegible]

Specific [illegible] 2 Bro. Ch. 341. 12. Ves. 570.

Courts of Chancery will [illegible] decree a specific performance of a Cont. [illegible]

[illegible]

Specific [illegible] a Court of [illegible] for Ch. [illegible]

[illegible] grant [illegible]

[illegible]

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[illegible] for this [illegible] the [illegible] in Chan. they [illegible] the same [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] Statute for [illegible] a penalty.

The [illegible] which Chan. proceeds [illegible] Court is that [illegible] to [illegible] legal interest [illegible] seems to be [illegible] a [illegible] Statute the rule of conscience [illegible] from which [illegible] opposition [illegible]

The Com. [illegible] have a Statute allowing a person [illegible] a Court of Law to appeal to the conscience of his antagonist under oath [illegible] Court [illegible] will give judgment for the Plff to recover the actual [illegible] with costs [illegible] which makes the proceedings the same as in a [illegible] Chan. except the [illegible] allowing costs which makes [illegible] a degree [illegible] the Plff [illegible] [illegible] the Court [illegible]

In Chan. if [illegible] refuse to testify the Court will take the allegations of the Plff [illegible] confess no one can compel another in Chan. to [illegible] him to a penalty the Plff must therefore in his Bill waive the penalty if there is any this waiver will prevent the Plff from [illegible] proceeding to recover the penalty whether in Law or Chan.

Their Power of Relieving against Penalties

Courts of Chan. exercise an extensive power over penalties to relieve a person who has been [illegible] himself by one vs. it – It was formerly considered there was no relief vs a penalty either in Law or Cha., so considered until Chancellor More swore by the body of God that if the rest of the Chancellors would not relieve vs them he would [illegible] since that they have exercised that power unless when the penalty is quite [illegible] adequate to [illegible] injury [illegible] the Plff [illegible] [illegible] consequ[illegible]

cont. to convey land & dies Cha. will consider the land as transferred to the Covenantee & will compel the heir of the covenantor to make a conveyance or will decree that the Covenantee quietly enjoy, so on the other hand the money to be paid for this conveyance will be considered as having transpired at the time of making the agreement & will therefore go to the Executor & not to the heir for Cha. will consider that the testator intended to turn his real estate into personal for the benefit of his representatives &c. 1 P. W. 322. 3 P. W. 211. 2 P. W. 171. P. Cha. 543.

So when one by his devise directs money to be laid out for land this money shall be considered as real property for the benefit of the heir so where one directs his land to be sold for money the land will be considered in Cha. as personal estate & Cha. will compel a sale for the benefit of the representatives

But if lands are devised for the payment of debts if the avails of the sale amount to more than enough to pay the debts the remainder will be considered in Cha. as a resulting trust for the benefit of the heir & the Executor will be compelled to pay it. 1 Vern 471.

It is easy to infer from the above rules that money may pass by a devise of all ones lands so on the other hand lands may pass by a devise of all ones personal property. 2 Vern 679. 3 Atk 254. 1 Sal. 15.

It is frequently the case in Eng. for men to devise their real estate for the payment of debts this power or trust of selling the land is generally given to the Executor tho' it may be to another person

By the Com. Law unless the Executor or other trustee will willingly execute this trust there is no means of compelling him — But Cha. will compel the Executor of this trust & unless the Ex. or person appointed accept of the trust Cha. will appoint some other person to execute it for Cha. have cognizance of all trusts to compel their execution.

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Whenever the Jurisdiction of a Court of Probate is necessary to compell the payment of debts they will order them paid [illegible] paper

That in Con. & perhaps in all of the States lands are liable for the payment of debts the [illegible] of Probate will order the Ex. to sell them & unless [he] obey the order he is liable on his [bond] to the Con. all debts are paid & [illegible]. as in Cha. in Eng.

That if the Testator in Con. should appoint another person to make a sale of land a Court of Probate has [no] power to compell him to execute

Courts of Law [know] nothing of an Equity of Redemption / Courts of Cha. therefore exercise an exclusive power over them & when devised for the payment of debts will compell a sale.

That in Con. an Equity of Redemption [may] be attached during the life of the Mortgage & on his death Courts of Probate will compell a sale for the payment of debts.

Then [illegible] of Marshelling Assets

In Eng. lands are [illegible] [illegible] into the hands of [illegible] [illegible] payment of specialty debts [illegible] [illegible] simple contract debts [illegible] [illegible] [illegible] may come upon the [illegible] the [illegible] [illegible] personal [illegible] [illegible] debts of the [illegible] [illegible] [illegible] [illegible] so as not to leave enough [illegible] [illegible] [illegible] [illegible] [illegible] the simple contract Cr. [illegible] to the [illegible] [illegible] the specialty Cr. have taken of the personal fund & the simple Contract Cr. thereby [illegible] Cr. [illegible] [illegible] [illegible] [illegible] [illegible]

Specialty Debts [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

Courts of [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

[illegible] [illegible] [illegible] [illegible] [illegible]

[illegible] [illegible] [illegible] [illegible] [illegible]

[illegible] [illegible] [illegible] [illegible]

of the Defendants not performing his agreement.

This power of relieving is allowed the Courts of Law in Eng. by Statute & also in most of the States (Chan. down the Bond or other penal Contract to the actual sum due

If the penalty is to compel a collateral act to be done it is a security for actual damages when it is to secure the payment of money it is a security for the money & lawful interest

(When the sum contained in a Bond or obligation is in the nature of ascer.d damages between the parties it is no penalty but where the sum is to secure the act (i.e.) when the act is to be done is the primary object the sum to be paid will be considered a penalty.

A bond containing a penalty conditioned to do several acts or to pay money by different instalments is forfeited by the non performance of the first act to be done

(But in an action on that Bond a the Court will Chan. it down to the actual damages you will recover only for the non payment of the first instalment but an action may be [illegible] as often as the instalments become due or breaches [illegible]
2. P. W. 19. 10 Mod. 517. 2 Ver. 52. 1 Bro. P. C. 417.

(When the act to be done is such as the Cou. can decree a spec. per.f & the penalty is merely to enforce the doing the act Chan. will decree a specific per.f of the act but if it appears to be at the election of the obligor whether to do the act or pay the sum agreed Chan. will not decree a spec. per.f 2 Bin. 118.

Their power over Mortgages

Mortgages have [illegible] also a subject of Equitable jurisdiction without the interference of the Legislature till very late.

Cou. take cognizance of Mortgages as trusts they consider the Mortgagee after the Mortgage estate vests absolutely in him at Law as trustee [illegible] the estate [illegible]

that once a Mortgage always a Mortgage after the debt is paid he then becomes a revoked Trustee & Cha. will compel him to reconvey — Cha. will compel the mortgagor on redeeming to pay not only the sum due on the mortgage but also all equitable debts as where a penal Bond was given to secure the debt of the interest at the time of redemption amounted to more than the penalty of the Bond But Cha. will notwithstanding compel the payment of the whole interest.

Their Power over securities for compound interest

Securities for compound interest are lawful for from the terms of every security for lawful interest compound interest is included for it is a certain sum on every $100 to be paid annually therefor as interest is due annually if it is not paid the obligee ought to be allowed interest on interest.

But Chan. have considered securities for compound int as vs. sound policy for a P. may not be aware how fast interest is accruing vs him upon such securities neither Court. of Chan. or Law will allow any more than simple interest.

Their Power to compel the payment of Legacies

The practice in Eng. to compel the payment of a legacy is most usually by application in Cha. tho. the Spiritual Courts have a concurrent jurisdiction with Cha. over testamentary matters but Courts of Law in Eng. have nothing to do with testamentary matters.

The Executor is considered in Cha. as trustee to the legatee & Cha. will compel him to execute this trust which they consider as binding in conscience.

But the practice of suing for a legacy in Con. is before the Com. Law Court

The Judge of Probate has an exclusive power over testamentary matters but an appeal lies from him to the Supreme Court

It is ... in Cha. ... ... [illegible]

[illegible] become a Trustee to [illegible] to the [illegible] of [illegible] [illegible] by [illegible] to [illegible].

Their Power over Trusts.

When [illegible] holds an estate in trust for another [illegible] will compell the trustee to execute that trust according to the [illegible] of [illegible] some times [illegible] will compel him to convey the estate to cestuy que use.

In Con, when an estate is [illegible] one to the use of another the legal title is in the Trustee but in Con. there is a Statute transfering that Legal title to the Cestuy que use but in Con. Cha. in such case will compell the trustee to let the Cestuy que use have the enjoyment & profits of such Estate.

And in Eng. where an estate is conveyed to A. for the use of B. in trust for C. Cha. will compell B to execute the trust Cha. will always compell the Trustee to execute the Trust according to the [illegible] of the [illegible] & will exercise a legal discretion about compelling the Trustee to convey the legal title. Therefore if an estate is given to one in trust for a profligate son to prevent his wasting the estate Cha. will not compel a conveyance of the legal title to him unless [illegible] to pay meritorious & bonafide Crs their debts.

The Trustee cant prevent the cestuy que use from entering & taking the beneficial use of the estate.

But if the trustee convey this trust est. to bonafide purchaser the purchaser not having [illegible] of the trust, he shall hold it. Tho the Trustee would be answerable to the cest que use but in Con. there is not the same danger of impositions for the fact of its being a Trust estate must be notorious for the [illegible] of the Cest que use will appear on the record of the Town Clerk. Quere would not the fact of the Deed being recorded be sufficient notice in case [illegible] the Cest que use of any purchaser.

A man may also become Trustee to [illegible] another [illegible] [illegible] [illegible] when [illegible]

employed to purchase lands for another takes the deeds in his own name here Cha. will consider him as having the legal title to the land & holding it in Trust for the principal & will compell him to convey the legal Title to the principal.

So too when one employs another to sell lands for him & conveys the land to the Agent so that the Agent may convey to the Purchaser. If the Agent does not convey the land Cha. will consider him as holding the ~~interest~~ for the principal & will compell him to reconvey

When the Law creates a trust it may depend on parol proof for when a mans title is created by facts merely & not by the terms of Court. it is clear that it depends on parol proof for these facts can be shewn only by parol proof such cases therefore are never contemplated by the Statute Chan. 1 Ver. 318. 2 Atk. 150. Amb. 409.

It has been holden in Cha. that if a man purchase lands & take a Co. conveyance to his Son or to his wife that such land shall be considered as a provision for such son or wife & they will not be considered as holding in trust for the purpose of defrauding Cr.s he cant compell the Cr.s of that trust is in Law or Cha. 2 Vern 683.

Effects of Declaration of Evidence

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will dismiss the Bill [illegible] the party to proceed at Law on the evidence discovered such evidence would be [illegible] [illegible] Court of Law as the facts found by Cha.

Third when the party in his Bill prays for a discovery of evidence & also for a trial of his case Cou. have in some cases retained after a discovery of evidence & in some cases they have dismissed it & it is impossible to determine from the authorities in what cases they will & in what cases they will not. 12 Vesey. 2 Atk. 650. 1 Ves. Cha. 194. 1 Atk. 262. 1 Ves. 521. 2 [illegible]

But if the case is properly cognizable in Cha. they will undoubtedly retain the Bill tho it contains a petition for discovery of evidence only.

When facts are discovered in Cha. or Eq. the Court will make out a feigned issue, or [illegible] to be tried by a Jury in a Court of Law tho the Chancellors some times try the facts themselves.

In Con. the Court of Chancery usually find the facts themselves but when they are too burthensome they appoint a Committee to find them but no feigned issue is ever made.

Of Commissions for taking depositions.

Depositions are never allowed to be taken in a Court of Law either in Eng. or in Con. to be improved in a trial but in [illegible] [illegible] in Eng. they are [illegible] allowed [illegible] [illegible] [illegible] [illegible] suit unless when the witness can't appear [illegible] on account of sickness & the like.

But when one [illegible] [illegible] [illegible] [illegible] witness to prove [illegible] [illegible] or [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] will on petition issue a Commission to take the depositions of such persons to be improved [illegible] in Law or Cha. when a suit is commenced or [illegible] [illegible] provided the [illegible] [illegible] [illegible] [illegible] be had you must state it [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

suppose your demands are so infamous [illegible] likely to be [illegible] and you [illegible] your [illegible] claim.

The Court [illegible] is a [illegible] allowing applications of this kind [illegible] [illegible] and [illegible] Law.

[illegible] found [illegible] lost deeds & bonds,

Whenever your Antagonist has got a deed or obligation into his hands wrongfully you may petition in Chan. to compel him to make discovery under oath in [illegible] respect to the deed. Formerly you could not prove the contents of a lost deed in a court of law tho' you could prove it [illegible] [illegible] was because you are in all cases compelled to make a proferr of the deed or [illegible] produce it on Oyer — [illegible] [illegible] settled [illegible] [illegible] that when you have lost your deed by time or accident or it is in the hands of your antagonist you may state the [illegible] in your declaration prove them on trial & also the contents of the deed [illegible] [illegible] [illegible].

[illegible] [illegible] [illegible] to state in all cases that your deed was lost by time or accident

[illegible] you may still [illegible] to [illegible] your antagonist in Chan. when the deed was in his hands but there [illegible] [illegible] [illegible] [illegible] shew [illegible] Chan. [illegible] other cases [illegible] 17. [illegible] 107. [illegible] 51. [illegible] 57. [illegible] [illegible] the same [illegible] [illegible] 180. [illegible] 218.

When the Deft. had paid a sum which is [illegible] on the lost deed he [illegible] from it in a [illegible] of Law if he can [illegible] he may [illegible] the Plff. [illegible] in Chan.

[illegible] [illegible] [illegible] [illegible] lost a [illegible] [illegible] [illegible] may petition [illegible] [illegible] to the [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

Their power of Compelling Partition.

Formerly Courts of Law could not compel joint tenants or Tenants in Com. to make partition.

But by Statute in Eng. & [illegible] of the states they may be compelled by a court of law to make partition.

But Cha. exercises a power of compelling partition they still retain this power in Eng. but such power is not compatible to [illegible] [illegible] one Tenant retains the Title &c. & this must be the ground on which Cha. first examined this power unless they considered one as trustee to the other, each might be considered as holding the whole estate in trust [illegible]

In Eng. partition is made by [illegible] with a Jury of 12 men & a Com. in which [illegible] [illegible] upon the parties.

Their power of rectifying mistakes [illegible]

Another power which is [illegible] Chancery exercised is that of rectifying mistakes which have been made by parties in a contract; they will admit [illegible] to show that the [illegible] mistake which could not be done in a Court of Law.

But because [illegible] will [illegible] different operation at Law than [illegible] the parties before Cha. will [illegible]

When an [illegible] is defective [illegible] [illegible] Cha. [illegible] [illegible] [illegible] [illegible] asked the [illegible] to this [illegible] [illegible] [illegible] [illegible] before a [illegible] or the [illegible] [illegible] [illegible] [illegible] by a decree in Cha. [illegible] [illegible]

for the decree appears of record but if a purchaser had paid a bona fide consideration for this land knowing the [illegible] [illegible] of the decree he will hold it [illegible] [illegible] by law allowed to prefer himself to another but courts of Cha. will never [illegible] a defect in a court [illegible] the defect was there [illegible].

For if a party enters into a [illegible] [illegible] that Court he enters into Cha. will never [illegible] because it does not have the same effect or [illegible] so beneficial as he expected.

Cours of Cha. have [illegible] interfered in any of the above cases in favor of [illegible] [illegible] 2 [illegible] 315. 1 [illegible] 57.

(Their Power of protecting the property of a Feme Covert)

Another power of Cha. is to protect the seperate property of married woman

It is lately settled in Cha. that the wife may hold property seperate & independent of the husband & Cha. will protect the property of the wife & protect the husband from meddling with it. The method of proceeding [illegible] the husband in such cases by the wife joining the husband with her in the Bill so that the Husband [illegible] be both Plff & Deft 2 Ves 452. [illegible] Cha. 2 7[illegible].

So too she may compel him by her own suit without joining him to execute marriage settlement agreements & the reason why an adequate remedy cant in this case be had in a Crt of Law is because damages only can be recovered in a Crt of Law which would be the husbands therefore the right & duty would meet in the same person 2 Ves 493.

So agreements between husband & wife to seperate & for seperate maintenance are enforced in Cha. 2. P.W 243.

It is now holden & the [illegible] otherwise that property may be conveyed directly to the sole & seperate use of the wife [illegible] [illegible] [illegible] & Cha. will protect her in holding such

by her own suit without joining the Husband with h[illegible]
2 P. W. 243.

So a Bond executed to the wife conditioned to have her a sum of money on her death both in Law & Cha. & merly it was considered as a cont of [illegible] as avoided by the marriage & [illegible] considered as a debt; in principle the right of duty must meet in same person but Cha. considered it a cont. trust or Bond 2 P. W. 243. 2 Vern. 480. 2 Atk. 97.

It will follow from the above rules that the Husband may become a D. to his wife & it is frequently the case in Eng. for men to borrow their wives separate property & in such case if the wife can prove that she lent the property for some particular purpose to be restored again Cha. will compell the Husband to pay it 2 Vern. 437. 1 P. W. 264. 3 Bro. Cha. 201.

Many contracts of importance made between Husband & wife are binding on the Husband in Cha. as contracts made to encourage industry of the wife 1 Atk 270. 3 P. W. 334. 2 Bro. Cha. 340.

[illegible]

So where the decree that one should pay £ 3000 by such a day [illegible]

[illegible]

Their Power of Protecting the Assignment of Bonds.

Bonds or other choses in action which are not assignable by law are protected in Cha. & if the obligor discharge the obligee Cha. will compel him to pay it over again to the assignee & if the oblige pay it to the assignor or accept of a discharge of him knowing of the assignment Cha. will compel him to pay it over again.

[illegible] may be had in such cases [illegible] by an action [illegible] but [illegible] Cha. [illegible]

Their Power of Decreeing a Specific Execution of an Award.

Cha. will some times decree a specific execution of an award [illegible] a personal one which is [illegible] as the Power of Cha.

[illegible] on the [illegible] of [illegible] being [illegible] further litigation Cha. [illegible] decree a specific execution of an award but [illegible] of the parties [illegible] the award is [illegible] (or according [illegible]) [illegible] acquiescence in the award [illegible] the [illegible] by bill in Cha. [illegible] 3 P. W. 187. 2 Ven 24.

Rules Neither of Which Come under a Particular head —

When two persons have a [illegible] Cha. will on a Bill [illegible] settle the whole at once & will compel each to account to the other.

The [illegible] of [illegible] of law [illegible]

[illegible]

might be [illegible] a [illegible] of law.

[illegible] [illegible] in all cases [illegible] a contract [illegible] is illegal the [illegible] contract is void [illegible] was [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] unless the illegality [illegible] the [illegible] [illegible] [illegible] 2 Wil. 247.

Bonds given for future [illegible] between [illegible] [illegible]

A bond given in consideration of [illegible] [illegible] [illegible] binding in law [illegible] [illegible] [illegible] [illegible] & [illegible] in consideration of future [illegible] where there was no [illegible] [illegible] [illegible] [illegible] cohabitation have been holden good [illegible] 2 Wil. 339 [illegible] 141. 2 [illegible] 1. 66. [illegible] [illegible] 2 [illegible]

Another [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] relief may be [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] all [illegible] [illegible] declar[illegible] [illegible] in effect an action of [illegible]

Where one of two [illegible] Merchants [illegible] the [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] the Executor of the [illegible] [illegible] [illegible] i. e. [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] by the C. [illegible] relief [illegible] [illegible] Executor [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] contract is [illegible] [illegible] will lie [illegible] [illegible] [illegible] Ex[illegible]

[illegible] [illegible] [illegible] [illegible] [illegible] [illegible] between parties [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] there is [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] effect [illegible] [illegible] 2 Ver. 371. 4 [illegible]

[illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

— to be done in Chan. is considered [illegible] therefore when one entered into articles of agreement to become a freeman in the City of London was entitled to one half of the [illegible] and [illegible] of [illegible] property on his death, & died without becoming a freeman yet Chan. [illegible] allowed [illegible] 3 P. W. 215. 1 L. W. 70. 4 Bro. P. C. 7.

So [illegible] [illegible] [illegible] [illegible] Court. Cr. have a [illegible] on the land of their deceased Dr. in the hands of the heir but if one agreed to convey land & dies his Cr. have no [illegible] on the land agreed to be conveyed for such agreement to convey [illegible] to the [illegible] in Chan. [illegible] a conveyance [illegible] 11 Mod 468.

But when one [illegible] a [illegible] on the land [illegible] [illegible] of the land [illegible] of the agreement to convey [illegible]

It has been something of a question in Chan. whether if property is agreed to be [illegible] & is cast on whom the [illegible] shall fall but it seems pretty well settled [illegible] [illegible] [illegible] must fall on the [illegible] for [illegible] [illegible] actually conveyed [illegible] would be. [illegible] 2 [illegible] 258

[illegible] [illegible] [illegible] [illegible] [illegible]

[illegible]

[illegible] [illegible] [illegible] Mod. 96.

Private Nuisance

Slander

[illegible] would be [illegible] the two [illegible] Slander [illegible] [illegible] by [illegible] [illegible] or the [illegible] words [illegible] [illegible] follows 1 [illegible] Oral [illegible] 2 Libels [illegible] 3 [illegible] [illegible] representations but without words [illegible] by [illegible]

Oral Slander

Oral Slander [illegible] by words spoken is of two kinds 1st words actionable in themselves & 2 words not [illegible] but which [illegible] [illegible] special [illegible] to the [illegible] [illegible] [illegible] are [illegible] [illegible] in themselves [illegible] absolutely injurious [illegible]

[illegible] [illegible] [illegible] to a [illegible] special [illegible] [illegible] [illegible]

[illegible] words [illegible] not actionable [illegible] [illegible] [illegible] [illegible] they are not absolutely injurious [illegible] [illegible] [illegible] special damage [illegible] [illegible] when they were spoken in consequence [illegible] [illegible] entitled to [illegible] action he must therefore [illegible] [illegible] on the [illegible] [illegible] damages [illegible] [illegible] 1 R. [illegible]

[illegible] a [illegible] rule that [illegible] [illegible] [illegible] are [illegible] applicable to [illegible] [illegible] [illegible] [illegible] to [illegible] words which [illegible] according to the definition [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] which [illegible] do not constitute Legal Slander [illegible] [illegible] of [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

[illegible] amount to slander Sel. 69[illegible]. [illegible] 1 Wils. 186. [illegible] [illegible] Mod. 266. 1 Com. [illegible]

There is a case reported in [illegible], where a charge of begetting a bastard was decided not to be [illegible], the begetting a bastard, as the case may be, [illegible] subject [illegible] to [illegible]. The decision however is consistent with the rule, for the charge was not that the child had become chargeable to the Parish, nor was it so stated in the declaration; consequently it was bad on [illegible]. [illegible] Sel. [illegible]

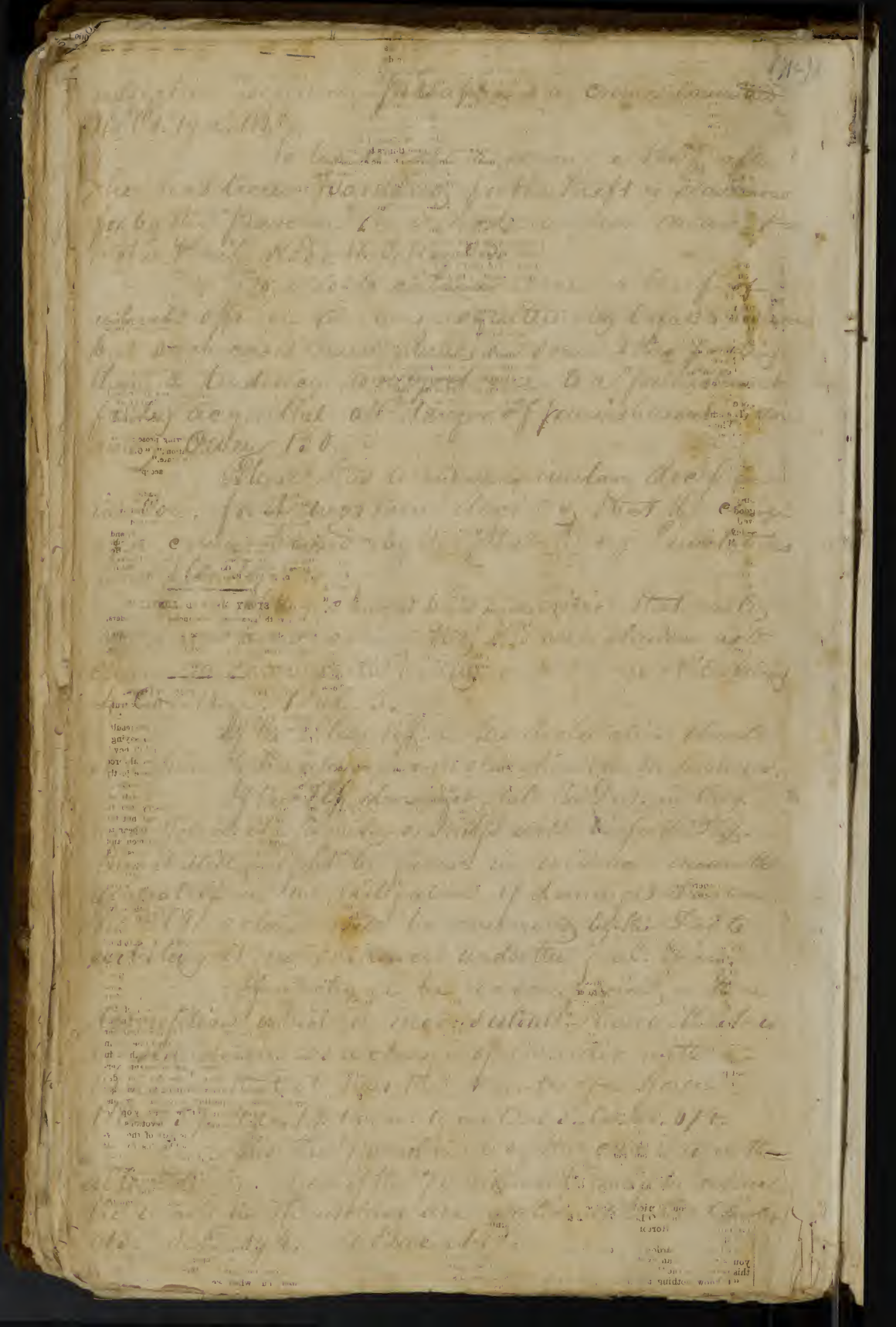
The Courts have taken this distinction, that in [illegible] a charge which if true would subject one only to a fine they are [illegible] if the charge be of an act which is infamous [illegible] of the [illegible] of the charge [illegible] [illegible] [illegible] taken in the [illegible] [illegible] [illegible] of their [illegible] 4 [illegible]. 18[illegible]. [illegible] 104. [illegible]

[illegible] [illegible] the [illegible] [illegible] charge [illegible] [illegible] the legal punishment [illegible] [illegible] appears clearly [illegible] [illegible] [illegible] [illegible] for [illegible] a charge of [illegible] amount to Slander for [illegible] [illegible] 17. [illegible] 198.

This charge of a criminal nature, & [illegible] amount to Slander be of an offence already committed [illegible]. [illegible] 1 Com. 1[illegible] [illegible] [illegible] [illegible] [illegible] [illegible] 4 [illegible]

The [illegible] [illegible] [illegible] in [illegible] 200.

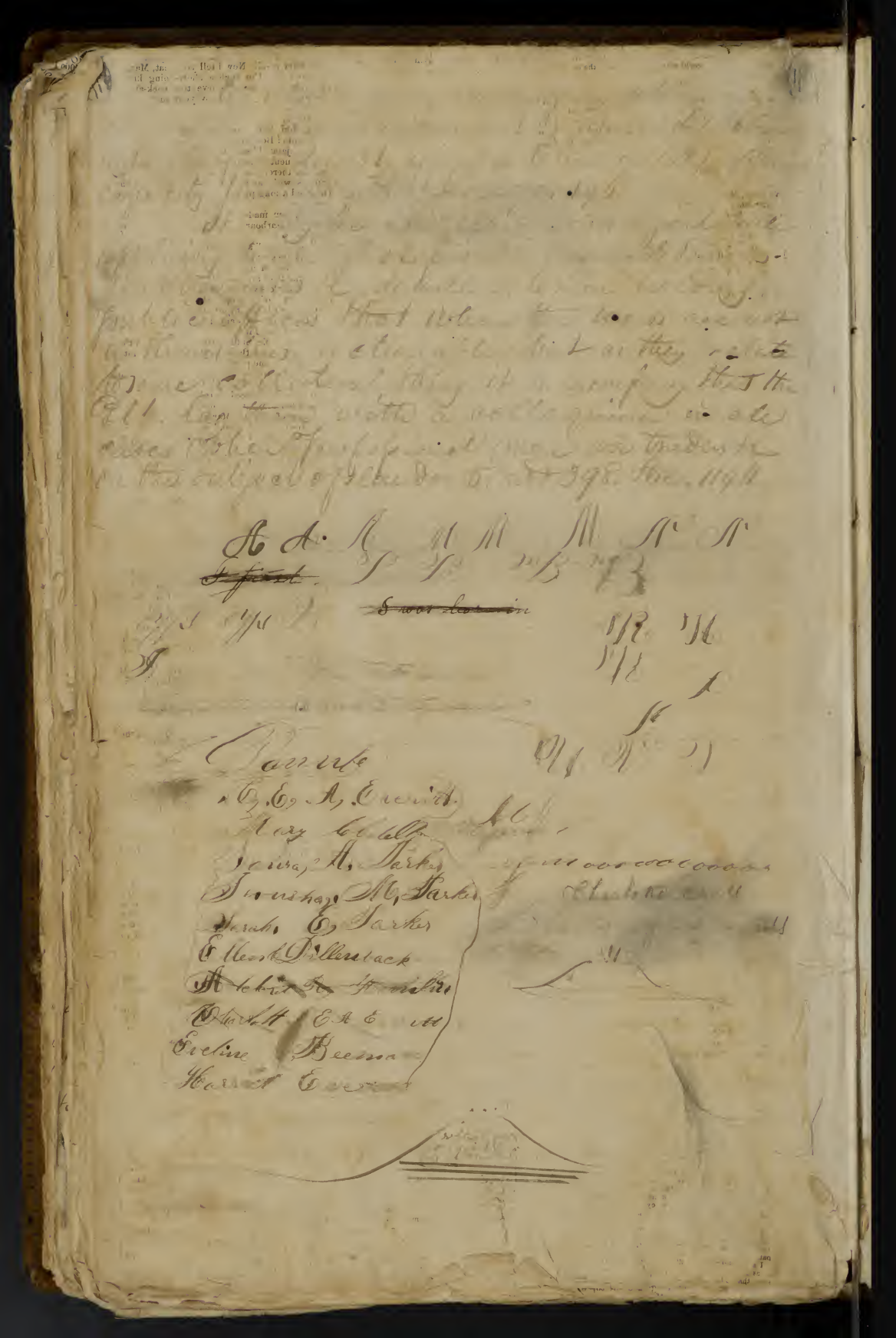
[illegible] as they [illegible] an offence committed [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]



9: Words which tend to [illegible]
[illegible] complete
[illegible]
[illegible] 54. [illegible] 54.
[illegible]
[illegible] foreseen [illegible]
[illegible] it was [illegible] 44.

2: Words which Have a Tendency to
Injure One in his Trade or Profession.
[illegible]
[illegible] of having [illegible]
[illegible]
[illegible] actionable. [illegible]
[illegible] 123. [illegible] 54. [illegible]
[illegible]
[illegible]
are actionable. [illegible] 182. [illegible] 87. 1 [illegible] 137.
[illegible]
[illegible] a [illegible]
[illegible] state [illegible]
[illegible] nowhere [illegible]
[illegible] the Law. [illegible]
Plff [illegible]
[illegible] be one on record.
To charge a trader with being a [illegible]
a Bankrupt knave or that he will be a bankrupt
[illegible] actionable [illegible]
[illegible] also to charge a [illegible]
[illegible] is actionable. 2 [illegible]
3 [illegible] 1088.
[illegible]
by [illegible]
[illegible]
[illegible]
[illegible]
[illegible]
[illegible]
[illegible]

(93)



The Boy And His Angel

By Mrs. C. M. Sawyer

Oh, mother, I've been with an angel to-day!
I was out, all alone, in the forest at play,
Chasing after the butterflies, watching the bees,
And hearing the woodpecker tapping the trees;
So I played, and I played, till, so weary I grew,
I sat down to rest in the shade of a yew,
While the birds sang so sweetly high up on its top,
I held my breath so that, for fear they would stop!
Thus a long while, I sat, looking up to the sky,
And watching the clouds, that were hurrying by,
When I heard a voice calling just over my head,
That sounded as if, 'come on brother!' it said;
And there, right over the top of the tree,
Oh mother, an angel was beck'ning to me!

business, who had ... Collett's affairs. The ... around him preserved a de ... ance of disinterestedness; and, the usual preamble to the will having been listened to with breathless attention, the man of business read the following in a clear voice:

"I bequeath to my neice, Emma Briggs, notwithstanding that she shocked her family by marrying an oilman, the sum of four ... pounds: being fully persuaded ... lost dignity, if she could find it ... would do nothing to provido her ... d, or clothing, or shelter."

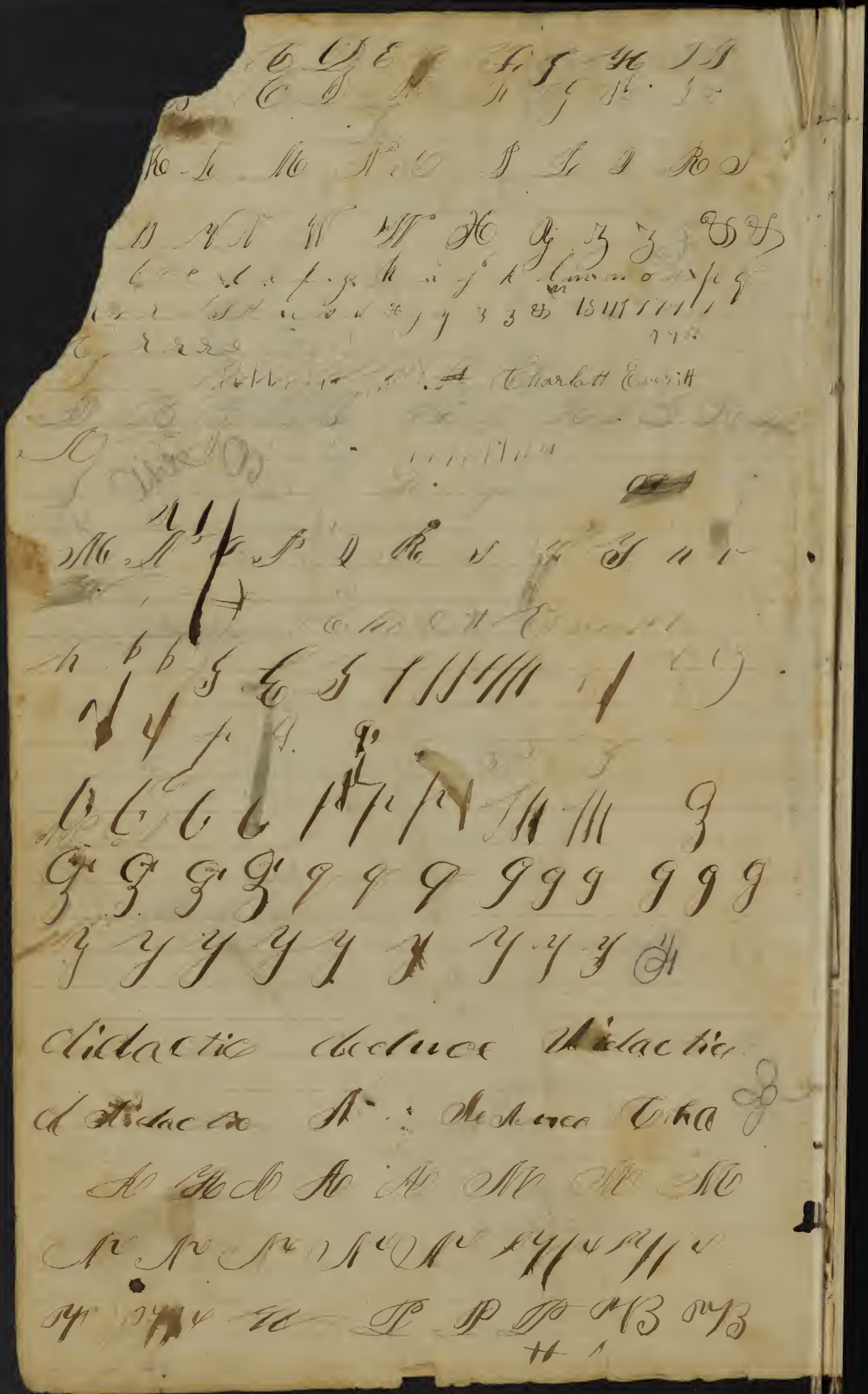
M... smiled, Peter Finch ground ... quiet, respectable man- ... Business went on with his ... ways held the opinion that ... should be rendered a rational and ... lent being—and ... the fact that society pr... ... r the right of earning her own ... —hereby bequeath to Mary Sutton, only child of my old friend, Frederick Sutton, the sum of ten thousand pounds, which will enable her to marry or remain single, as she may prefer."

John Meade gave a prodigious start upon hearing this, and Peter Finch ground his teeth again—but in a manner hardly respectable. Both, however, by a violent effort, kept silent.

The man of business went on with his reading.

"I have paid some attention to the character of my nephew, John Meade, and have been grieved to find him much possessed with a feeling of philanthropy, and with a general preference for whatever is noble and true over whatever is base and false. As these tendencies are by no means such as can advance him in the world, I bequeath him the sum of ten thousand pounds—hoping that he will thus be kept out of the workhouse, and be enabled to paint his great historical picture —which, as yet, he has only talked about.

"As for my other nephew, Peter Finch, ... views all things in so sagacious and ... lfish a way, and is so certain to get on in life, that I should only insult him by offering an aid that he does not require; yet, from his affectionate uncle, and entirely as a testimony of admiration for his mental acuteness, I venture to hope that he will accept a bequest of five hundred pounds towards the completion of his extensive library of law-books."



A B C D E F G H I J

Idleness and ignorance are the parents of many

Idleness and ignorance are the parents of many

Adalaide Hamlin

Lawrence

Charlott Everitt

Dickinson

Mr Harry Raymond

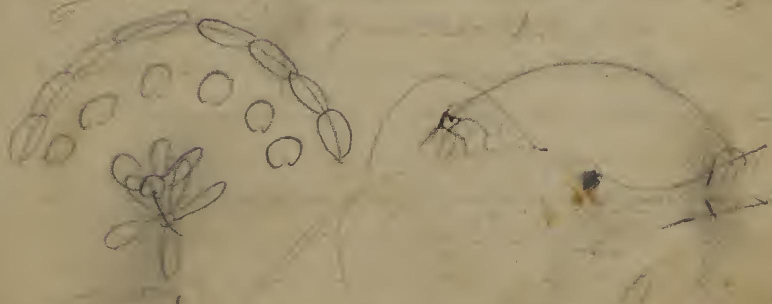
Amanda Giles

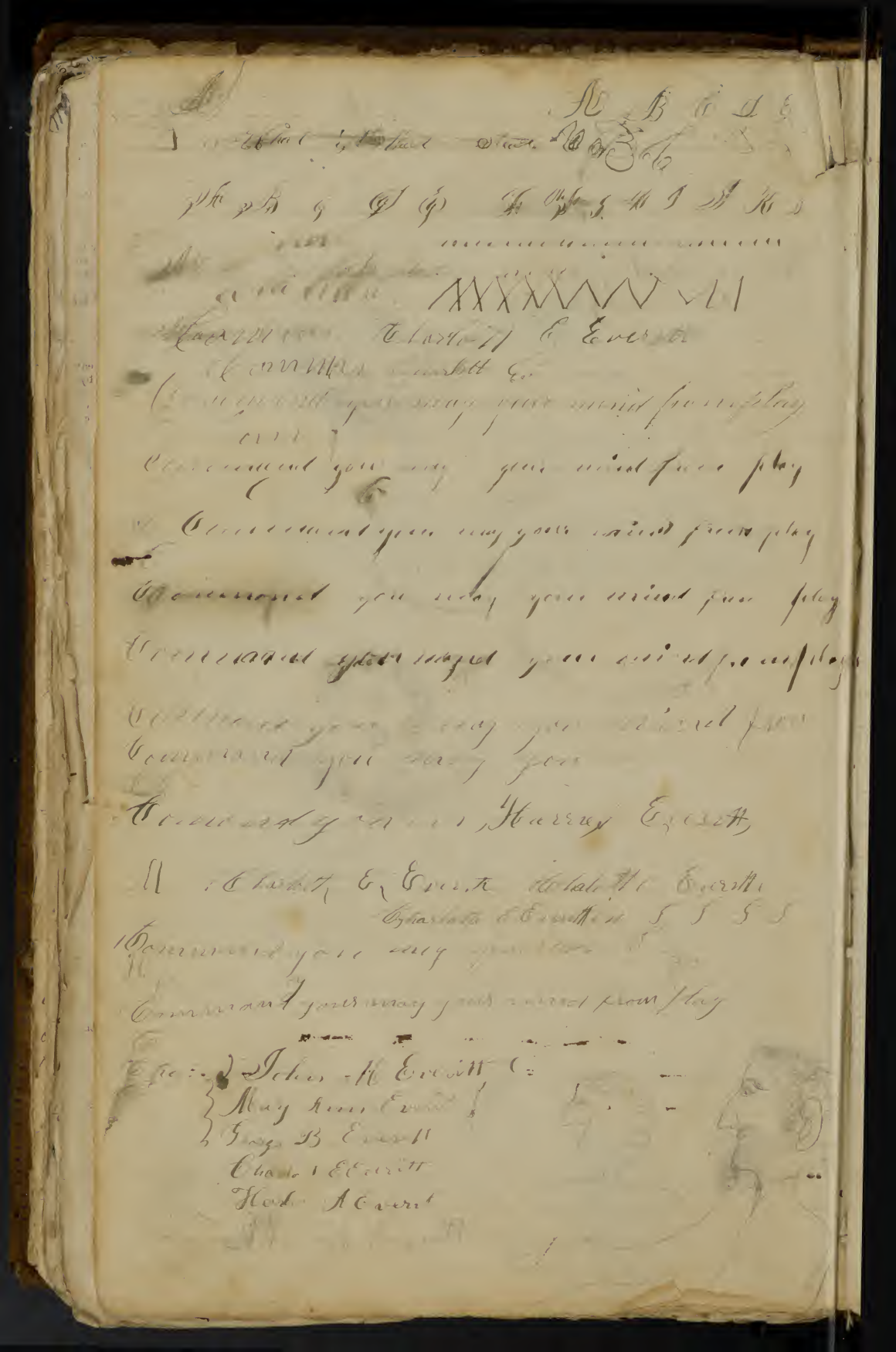
Kerrsville. Dickinson

leisure hours I thought

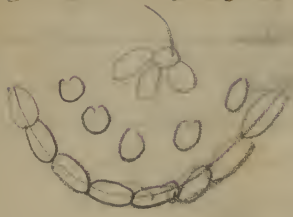
I would write

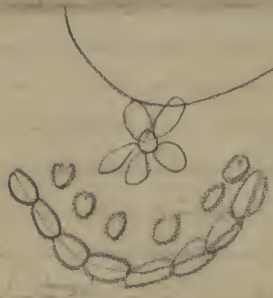
The fairer needs the





A B C D E F G H I J K L





Donation

that steals
that stea

1 What is this that steals upon my frame
Is it death is it death ... mortal frame
that soon shall quench shall quench this mortal frame
is it death is it death
If this be death i soon shall be
from every pain and sorrow free
I shall the King of glory see
All is well all is well

2d Weep not my friend my friends weep not for me
All is well all is well
My sins are pardoned pardoned i am free
All is well all is well
There is not a cloud that doth arise
To hide my ~~saviour~~ Savior from my eyes
I soon shall mount the upper skies
All is well all is well

3 Tune tune your harps your harps ye saints in glory
All is well all is well
I will rehearse rehearse the pleasing story
All is well all is well
Bright angles are from glory come
Theyr round my bed theys in my room
They wait to waft my spirit home
All is well all is well

Charlotte Everett
The Lake of the dismal swamp

1 They made her a grave too cold and damp
For a heart so warm and so true
And shes gone to the lake of the Dismal Swamp
Where all night long by firefly lamp
She paddles her white canoe

2 And her fiery lamp I soon shall see
And her paddle i soon shall hear
Long and loving our lives shall be
And I'll hid the maid in a cypress tree
When the footsteps of death are near

3 Away to the dismal swamp he speeds
His path was rugged and sore
Through tangled juniper beds of reeds
Through many a fen where the serpent feeds
And man never trod before

4 And when on the earth he sunk to sleep
If slumber his eyelids knew
He lay near the deadly vine doth weep
Its venomous tear and nightly steep
The flesh with blistering dew

[illegible]
And was him the

The lake of the Dismal Swamp

The lake of the Dismal Swamp

1 They made her a grave [illegible] damp
For a [illegible] and true
[illegible] gone to the lake of the Dismal Swamp
[illegible] night [illegible] by a firefly lamp
She paddles her white canoe

2 And her firefly lamp i soon shall see
And her paddle I soon shall hear
[illegible] being [illegible] shall be
[illegible] hide [illegible] cypress tree
When the footstep of death is near

3 Away to the dismal swamp he speeds
His path was rugged and sore
Through tangled juniper beds of reeds
Through many a fen and mighty steep
Then flash [illegible] serpent feed

4 And when [illegible]
[illegible] his eyes [illegible]
He lay where he [illegible]
[illegible] mighty [illegible]
The plains with blistering [illegible]

And near him the she wolf stirred the brake
And the copper snake breathed in his ear
[illegible] starting cried from the [illegible]
Oh when shall i see the dusky lake
And the white canoe of my dear

6 [illegible] lake [illegible]
Quick over its surface [illegible]
[illegible] my dear [illegible] light
And the dim shore echoed for many a night
The [illegible] the [illegible]

7 All till he followed a note of that barke
which carried him off from the shore
Far he followed the meteor spark
the wind was high and the clouds were dark
and the boat returned no more

8
But oft from the Indian hunter camp
This lover and maid so true
Are seen at the hour of midnight damp
To cross the lake by a fire fly lamp
And paddle their white canoe

The lake of the Dismal swamp

The lake of the Dismal swamp
They made her grave too cold and damp
For a heart so warm and true
And she's gone to the lake of the Dismal swamp
Where all night long by a fire fly lamp
She paddles her white canoe

And her fire fly lamp I soon shall see
And her paddle I soon shall see
Long and loving [illegible] [illegible] [illegible]

Edwin [illegible] [illegible] Co K 1[illegible] Regt [illegible]
Wounded at the Battle of Chapin [illegible]
which was fought Sept 29 [illegible]

Charles

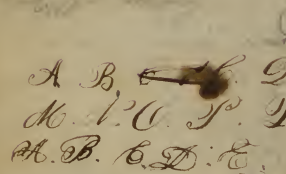
Communication

Communication

R Bring me a

R Will you bring me

Ass a horse



A B C D E F G H I J K L

M N O P Q R S T U W X Y

A B C D E

A B C D E F G

Islington Bennington Thomas

Byllington Thomas

Command you my your mind from play

Penmanship Penmanship Pronoun Pronoun

Question the Queen Rosemist Send Mony

Communication Communication